Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals, in square conflict with the Fifth Circuit's decision in *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and at odds with the principles laid down by this Court in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), held that federal authority under Clean Water Act Section 404 encompasses wetlands on petitioners' property that have only an ephemeral, intermittent, occasional, and indirect manmade hydrological connection to navigable waters located miles distant. The question presented, which is of critical nationwide importance to determining the scope of burdensome federal permitting schemes and the balance of power between state and federal regulators, is:

Whether federal Clean Water Act jurisdiction over "navigable waters" extends to wetlands that are not adjacent or contiguous to open waters but from which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections.

RULE 29.6 STATEMENT

None of the petitioners has a parent corporation or a non-wholly owned subsidiary, and no publicly held corporation owns 10% or more of any petitioners' stock.

Additional plaintiffs in the district court and appellants in the court of appeals were the Virginia State Water Control Board and Dennis H. Treacy, Director of the Virginia Department of Environmental Quality.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Newdunn Associates LLP, Orion Associates, and Northwest Contractors Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 344 F.3d 407. The opinion of the district court (App., *infra*, 20a-56aa) is reported at 195 F. Supp. 2d 751.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1251(a), (b), (g), 1311(a), 1344(a), (b), (g), 1362(7), (12), (14) are set forth at App., *infra*, 57a-60a. The relevant regulations, 33 C.F.R. §§ 328.3(a), (b), (c), (e), and 33 C.F.R. § 328.4(c) are set forth at App., *infra*, 60a-62a.

STATEMENT

The issue in this case is whether Congress, in enacting Section 404(a) of the Clean Water Act ("CWA" or "Act"), authorized the United States Army Corps of Engineers ("Corps") to assert jurisdiction over activities on property containing wetlands adjacent to manmade ditches that are only intermittently wet and that are located miles from navigable waters. The Corps has asserted jurisdiction in this and other cases based upon its interpretation that the navigable waters of the United States encompass any wetland from which rainwater may ultimately flow into navigable waters, no matter how remote, indirect, or occasional that runoff may be. In upholding such broad federal jurisdiction

(and reversing the district court), the Fourth Circuit seriously misunderstood this Court's teachings and created a square conflict with the Fifth Circuit as to the scope of a major federal statute affecting the use of land across the Nation.

This Court recently set forth the principles governing the Corps' exercise of jurisdiction under Section 404 of the Clean Water Act. *Solid Waste Agency of Northern Cook County* v. *United States*, 531 U.S. 159 (2001) ("*SWANCC*") (Corps jurisdiction does not reach ponds, not adjacent to navigable waters, that are used by migratory birds). This Court found that "the plain text and import of § 404(a)" is that it reaches only waters and wetlands that have a "significant nexus" and are "inseparably bound up with" waters of the United States, and that applying that standard the Act does not reach "nonnavigable, isolated, intrastate waters." *Id.* at 167, 169-170. This Court also found "no persuasive evidence" that the Corps erred in 1974 when it promulgated regulations interpreting the statutory term "navigable waters" as waters that are navigable in fact, have been navigable in the past, or could be made so in the future. *Id.* at 167. And it could discern no purpose in 1977 amendments to the CWA "[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters.'" *Id.* at 170-171.

The Fifth Circuit, in *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), applied the principles set forth in *SWANCC*. Reading *SWANCC* to authorize CWA jurisdiction over waters that are "actually navigable" or "adjacent to an open body of navigable water," the Fifth Circuit held that "a small seasonal creek" and "intermittent streams which only infrequently contain running water" are not "sufficiently linked" to navigable waters to themselves "qualify as 'navigable waters.'" *Id.* at 270-272.

In stark contrast to *SWANCC* and *Rice*, the Fourth Circuit's ruling here allows the Corps to control

development, agriculture, and other land use activity in every wetland from which any rainwater runoff may ultimately, on occasion, reach navigable waters. The Fourth Circuit treats ephemeral, intermittent waters distant from navigable waters as within CWA jurisdiction; the Fifth Circuit does not.

The Fourth Circuit also held that manmade roadside ditches and culverts were waters of the United States. App., *infra*, 17a. Yet, the Corps has long recognized a distinction between manmade ditches and natural streams, and, prior to this Court's decision in *SWANCC*, did not generally consider manmade drainage ditches to be waters of the United States. See 51 Fed. Reg. 41206, 41217 (1986). Nonetheless, the Fourth Circuit considered the distinction "irrelevant," App., *infra*, 17a, deferring to the Corps' new position.

The Fourth Circuit's decision in this regard directly conflicts with the plain language of the CWA, which defines ditches, culverts and other manmade conveyances as "point sources," 33 U.S.C. § 1362(14), App., *infra*, 60a, not as "waters of the United States." 33 U.S.C. § 1362(7), App., *infra*, 59a. And the Corps only sometimes, on a case-by-case basis, considers ditches and culverts to be jurisdictional "tributaries" of navigable waters. Neither the Fourth Circuit nor the Corps provide any guidance to landowners as to when federal jurisdiction will be asserted over such ditches.

Under the Fourth Circuit's decision, the CWA reaches to the top of every mountain and the end of every street in the country. The Corps is permitted to exercise this broad jurisdiction without any showing of actual effect on navigable waters or interstate commerce. Given the split among circuits, the contrast between the virtually limitless jurisdiction accorded the Corps by the Fourth Circuit and the direction given by this Court in *SWANCC*, and the practical importance of the question presented to landowners and regulators throughout the country, this Court should grant certiorari.

A. The Statutory and Regulatory Scheme.

When Congress enacted the CWA, it delegated authority to the Corps to issue permits for the discharge of dredged and fill material into "the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); 33 U.S.C. § 1311(a); App., *infra*, 58a. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7), App., *infra*, 59a. The statute does not define "waters of the United States."

The Corps asserted jurisdiction in this case pursuant to regulations that define "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (33 C.F.R. § 328.3(a)(1), App., *infra*, 60a), tributaries of such waters (33 C.F.R. § 328.3(a)(5), App., *infra*, 61a), and wetlands adjacent to such waters or their tributaries. 33 C.F.R. § 328.3(a)(7), App., *infra*, 61a.

The Corps' regulations do not define the term "tributary," and do not define manmade drainage or irrigation ditches as navigable waters of the United States. In some regulatory interpretations, the Corps explains that a manmade ditch is subject to the Corps' jurisdiction only if it extends the ordinary high-water mark of an existing water of the United States. 65 Fed. Reg. 12818, 12824-25, App., *infra*, 38a n.13.[1]

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[1] The Corps' regulations specify that CWA jurisdiction in nontidal waters extends only to the ordinary high-water mark, or if adjacent wetlands are present, to the extent of those wetlands. 33 C.F.R. § 328.4(c)(1), (2), App., *infra*, 62a. In the preamble to its 1986 Regulations, the Corps states "[t]herefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible." 51 Fed. Reg. at 41217 (1986), App., *infra*, 38a.

However, the Corps reserves, on a case-by-case basis, the right to assert jurisdiction over ditches that can flow, even intermittently, into other covered waters, but articulates no meaningful guidance on the appropriate basis for such a decision. App., *infra*, 47a; see EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("*Corps 2003 Guidance*").

B. The Corps' Enforcement Action And The District Court's Findings Of Fact And Decision

During the summer of 2001, Newdunn Associates L.L.P. ("Newdunn"), and its agents, Orion Associates ("Orion") and Northwest Contractors Corporation ("Northwest"), began logging, filling and excavating on Newdunn's property in Newport News, Virginia. The Corps and the Virginia State Water Control Board ("Board"), acting through the director of the Virginia Department of Environmental Quality ("DEQ"), Dennis H. Treacy, filed enforcement actions in federal and state court, respectively. Both agencies accused Newdunn of conducting unauthorized activities in wetlands.[2]

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[2] Virginia state law, at the time of Newdunn's activities, specifically permitted placement of fill into wetlands. App., *infra*, 23a. Therefore, Newdunn's filling activities did not violate state law. Once a wetland is filled, it is no longer saturated to the surface with water and therefore no longer a wetland. The State alleged that because the placement of fill eliminating the wetlands was unauthorized by the Corps, Newdunn's activities in the converted uplands violated other state laws. Because the State's allegations hinged upon whether the fill was authorized, Newdunn removed the State's suit to the federal court, which consolidated the enforcement actions for trial. The Fourth Circuit held that the district court did not have jurisdiction to decide the asserted violation of state law. App., *infra*, at 13a. Petitioners do not seek review of that part of the Fourth Circuit's decision.

The district court conducted a five-day bench trial, after which it ruled that neither the Corps nor the Board had jurisdiction over Newdunn's property. The court found that the wetlands on Newdunn's Property "are not adjacent to navigable waters or waters of the United States by any reasonable definition of adjacency." *Id.* at 54a.

At trial, the "Corps' claim of jurisdiction [was] based solely upon the alleged surface water or hydrologic connection of the Property to the navigable portion of Stony Run." App., *infra*, at 29a-30a. The district court carefully traced how tenuous a hydrologic connection that was. "Rain generated runoff" only "*occasionally* exits the property through a spur ditch"—"[t]here is no evidence," the court found, "of the frequency or volume of th[at] surface water runoff." The spur ditch leads to a manmade drainage ditch that runs east of and parallel to Interstate 64 (the "eastern I-64 ditch"). That eastern ditch, the court found, "is *ephemeral*, or dry most of the year," and any water in it is "*intermitten[t]*." Any water that continues through the eastern I-64 ditch eventually reaches a culvert under I-64, through which it travels to another manmade ditch parallel to and on the western side of I-64. That western ditch, 1¼ miles in length, "was *constructed partially through dry land*." Water "*intermittently* travels" through the western ditch into the "not-navigable-in-fact" Western Arm of Stony Run, at a point a mile away from where the Central Arm of Stony Run becomes navigable. *Id.* at 30a-32a & n.10 (all emphases added).

The district court held that in these circumstances the Corps had "not carried its burden of factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States." App., *infra*, 45a. And any claim that wetlands on Newdunn's property were within the Corps' jurisdiction "far exceeded the grant of authority by congress in the CWA." *Id.* at 46a.

The court rejected the Corps' assertion that "a culvert or storm drainage pipe" is a "tributary." *Id.* at 45a.

The district court observed that although the Corps' 1986 regulations generally exclude non-tidal drainage ditches from its definition of tributaries, the Corps reserves the power to assert jurisdiction over such ditches on a case-by-case basis. *Id.* at 47a. Because the Corps failed to articulate any limits to its discretionary jurisdiction, the district court held, the regulations are insufficient to meet the constitutional guidelines set forth by this Court in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). *Ibid.*

C. The Fourth Circuit's Decision

The Fourth Circuit, although finding no error in the district court's findings of fact, reversed. It held that the attenuated connection between wetlands on Newdunn's property and navigable portions of Stony Run was a "sufficient nexus" for Corps jurisdiction. App., *infra*, at 19a. The Corps may permissibly assert jurisdiction over wetlands adjacent to nonnavigable tributaries of navigable waters, and may permissibly label as tributaries intermittent and ephemeral waters in manmade ditches and culverts and drains located miles from navigable waters. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

A. The Fourth and Fifth Circuits Are In Direct Conflict Concerning Whether Nonnavigable, Intermittent, Ephemeral Waters Are "Navigable Waters" Within The Meaning Of The Clean Water Act.

The Fifth Circuit in *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), interpreting the Oil Pollution Act, 33 U.S.C. § 2701 ("OPA"), was the first court of appeals to reconsider the jurisdictional scope of the term "navigable waters" after the *SWANCC* decision. *Id.* at 266. The court noted that the OPA and CWA contained the same definition

of navigable waters, which should be interpreted the same way. *Id.* at 267. The court reviewed its previously broad interpretation of the language of the CWA and contrasted it with this Court's holding in *SWANCC*. *Id.* at 268-269.

Noting this Court's warning in *SWANCC* that the word "navigable" cannot be read out of the statute, the Fifth Circuit held that "a body of water is subjected to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.* at 269. Based on that standard, the Fifth Circuit held that federal authority does not extend to waters or wetlands "that have only an indirect, remote and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272. See *id.* at 270-272 (holding that "a small seasonal creek" and "intermittent streams that only infrequently contain running water" are not "sufficiently linked" to navigable waters to "qualify as 'navigable waters'" subject to federal jurisdiction); see also *Corps 2003 Guidance* (observing that "[s]ome courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries" and that *Rice* "is the leading case taking the narrowest view of CWA jurisdiction after *SWANCC*").

The district court found that the ditch nearest Newdunn's property was ephemeral. App., *infra*, 30a. The Fourth Circuit did not overturn that conclusion. The Corps' only definition of "open water" specifically "does *not* include ephemeral waters." 67 Fed. Reg. 2020, 2094 (2002) (emphasis added). Therefore, Newdunn's wetlands are not adjacent to open water.

This case thus presents the opportunity to decide the important issue specifically reserved by this Court in *Riverside Bayview* as to which the circuits are now squarely in conflict: "the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." 474 U.S. at 131 n.8. Wetlands that are not

adjacent to actually navigable waters do not have the "significant nexus" that informed this Court's "reading of the CWA in *Riverside Bayview Homes.*" *SWANCC*, 531 U.S. at 167.

As the district court found and the Fourth Circuit did not contradict, the wetlands on Newdunn's property have only an occasional, manmade, indirect, remote and attenuated connection with a body of navigable water—the Central Arm of Stony Run. If Newdunn's property were located in the Fifth Circuit the district court's opinion would have been affirmed. Instead, the Fourth Circuit adopted a starkly contrasting view of federal authority.

Rather than restricting the Corps' jurisdiction to waters with a "significant nexus" to navigable waters or those that are "inseparably bound up with the 'waters' of the United States" (*SWANCC*, 531 U.S. at 167), the Fourth Circuit holds an indirect, manmade, and occasional "nexus" sufficient. App., *infra*, at 19a.

The Fourth Circuit extends the Corps' jurisdiction to "any branch of a tributary system that eventually flows into a navigable body of water." App., *infra*, at 16a. The Fourth Circuit requires no minimum volume or frequency of water flow to support jurisdiction, and remoteness of a wetland from navigable water is no bar to the exercise of jurisdiction. Anything that "eventually provides 'additional matter'" to a navigable water is a "tributary" and therefore subject to CWA jurisdiction. *United States* v. *Deaton*, 332 F.3d 698, 710 (4th Cir. 2003).

Further expanding CWA jurisdiction, the Fourth Circuit refused to find any distinction between natural tributaries and manmade ditches and culverts. App., *infra*, at 17a. The court of appeals held that the Corps' jurisdiction includes "the entire tributary system" including roadside ditches and culverts. *Id.* at 17a. In the Fourth Circuit, any drop of water flowing from any property to traditional navigable water

through any gutter, pipe, culvert, or ditch regardless of distance or amount of flow is 'navigable water' within the meaning of the CWA. Any wetlands 'adjacent' to the gutter, pipe, culvert or ditch would be subject to federal regulation.

The Sixth Circuit has similarly expanded CWA jurisdiction in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003). There, the court upheld CWA jurisdiction wherever a "hydrologic connection" is proven between wetlands and navigable waters. It held such a connection to be present when a wetland connected through manmade drains and creeks to navigable waters 11 to 20 miles distant. See also *United States* v. *Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) (upholding federal jurisdiction over wetlands adjacent to non-navigable "tributaries" 235 miles from the navigable water to which they connected).

B. The Fourth Circuit's Decision Is At Odds With The Principles This Court Set Forth In *SWANCC*

Recently, this Court in *SWANCC* considered whether Clean Water Act jurisdiction extends to isolated intrastate ponds that may provide habitat for migratory birds. This Court concluded that the text of the Act does not allow the Corps to exercise such broad jurisdiction. In denying the Corps' jurisdiction over isolated ponds this Court set forth principles to guide lower courts in determining the proper scope of Section 404 jurisdiction.

Prior to *SWANCC*, some courts had interpreted the Clean Water Act as granting jurisdiction to the full extent of the Commerce Clause. This Court rejected that approach. Instead, this Court held that the Corps' jurisdiction under the Act was based on Congress' power to regulate navigation. 531 U.S. at 168 n.3 (finding nothing to "signif[y] that Congress intended to exert anything more than its commerce power over navigation").

This Court rejected the Corps' position that the word "navigable" in the statute has no "independent significance." 531 U.S. at 172. This Court instead endorsed the Corps' view of the scope of the 1972 Act set forth in the Corps' 1974 regulations—as reaching waters navigable in facts, navigable in the past, or capable of being made navigable in the future. *Id.* at 168. Thus, "'it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.'" *Ibid.* quoting 33 C.F.R. § 209.260(e)(1)(1974). Statutory amendments in 1977 supported extending the meaning of navigable waters to include waters and "wetlands adjacent to 'navigable waters'" (*id.* at 170-171), leading this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to hold that Section 404(a) jurisdiction extended to "wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167.

This Court held in *SWANCC* that "the plain text and import of [CWA] § 404(a)" is that the Act reaches only waters and wetlands that have a "significant nexus" to and are "'inseparably bound up with'" navigable waters. 531 U.S. at 167. Wetlands that "actually abutted on a navigable waterway" and primary tributaries of navigable rivers satisfy that standard (*ibid.*); but "nonnavigable, isolated, intrastate waters" do not. *Id.* at 170.

In refusing to interpret the CWA to give the Corps jurisdiction over every pond in the country that might provide habitat for migratory birds, this Court relied on the principle that it takes a "clear statement" from Congress to "alte[r] the federal-state framework by permitting federal encroachment upon a traditional state power," such as "the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 173-174. Avoiding such encroachment through administrative overreaching is especially important in the case of the Clean Water Act, this Court observed, where Congress chose expressly to

'recognize, preserve, and protect the primary responsibilities and rights of States'" in those areas. *Id.* at 174.

The issue as to which, we have demonstrated, the courts of appeals are divided is where, within the jurisdictional scheme described in *SWANCC,* to fit wetlands that are not adjacent to traditional navigable waters but are adjacent to intermittent, ephemeral waters that occasionally run in manmade ditches and culverts through which they may eventually reach remote navigable waters. Like the Fifth Circuit in *Rice* v. *Harken*, we believe that a fair reading of *SWANCC* is that the CWA requires a more direct and substantial connection between jurisdictional and traditional navigable waters than the attenuated connection provided by the possibility of intermittent flow of some quantity of water through manmade ditches to remote navigable water. Remote, intermittent water in manmade roadside ditches is not in any meaningful sense, adjacent to, or a tributary of navigable water. As Justice Stevens understood in dissent in *SWANCC*, the effect of this Court's ruling is that "such 'isolated' waters as 'intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters'" are "completely excise[d] * * * from the scope of the Act." 531 U.S. at 189 & 190 n.14; see also *id.* at 187 n.13 (recognizing that wetlands, being only marginally "waters" are "the most marginal category of 'waters of the United States' potentially covered by the [CWA]").

Were the Corps correct in its assertion of power over water with any hydrological connection to navigable waters, no matter how remote and attenuated, the vast accretion of federal authority at the expense of traditional state powers that the Court fended off in *SWANCC* will have occurred anyway, and in a likely more potent form that leaves virtually no water anywhere in the nation beyond the Corps' reach. The same "clear statement" rule of statutory interpretation applied in *SWANCC* applies here. There is no more a clear congressional statement in the CWA that federal power

reaches wetlands adjacent to normally dry ditches that could on occasion indirectly carry runoff to remote navigable waters than there was a clear congressional statement found in *SWANCC* that federal power reaches isolated ponds used by migratory birds.

The Fourth Circuit thus failed to apply the teaching of *SWANCC*—in fact going through contortions to avoid the lessons of that case. Other courts of appeals have similarly sought to restrict the *SWANCC* decision to its facts, refusing to follow the plain statutory meaning described by this Court. *E.g.*, *United States* v. *Rapanos*, *supra*; *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001). Further guidance from this Court is now essential.

C. The Fourth Circuit's Decision That Roadside Ditches Are Tributaries Is Inconsistent With The CWA, Because The CWA Defines A Ditch As A "Point Source" And Not A Tributary

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters. The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The Clean Water Act further defines the term "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

By definition, pipes, ditches and conduits are not tributaries, but rather are point sources, which can, in some circumstances, discharge pollutants into navigable waters. In *Aiello* v. *Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001), for example, the court held that "culverts * * * qualify as point sources." *Id.* at 118. Because the culverts at issue there discharged pollutants into a pond and stream that were navigable-in-fact, CWA jurisdiction existed. *Ibid.*

The Fourth Circuit's definition of "tributary" includes anything that "provides 'additional matter'" that ultimately reaches a navigable water. *Deaton*, 332 F.3d at 710. If all pipes, ditches, channels, tunnels, conduits, wells, and discrete fissures are "tributaries," then a § 402 NPDES permit would be required for all discharges into these "waters of the United States." Absurdly, every homeowner would need a § 402 permit for *any* discharges from his property into a curbside gutter or house drain. See 33 U.S.C. § 1342.

The Environmental Protection Agency, which shares CWA regulatory authority, however, defines the system of "roads with drainage systems, * * * curbs, gutters, ditches and man-made channels, or storm drains" as Municipal Separate Storm Sewer Systems. 40 C.F.R. § 122.26(b)(8). Separate storm sewers and other conveyances of urban runoff "are point sources under the CWA." 55 Fed. Reg. 47990, 47991 (1990).

The Corps' litigation position that ditches and pipes are tributaries, which is inconsistent with the plain language of the CWA, and EPA regulations, leads to absurd results not intended by Congress, and should be rejected. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *Ragsdale* v. *Wolverine World Wide Inc.*, 535 U.S. 81, 86 (2002).

D. The Fourth Circuit's Erroneous Decision Flies In The Face Of Corps Regulations and Policy

Despite the Corps' litigating position in this and other cases since *SWANCC*, the agency's regulations have long recognized narrower limits on its jurisdiction. Concepts such as headwaters, ordinary high water marks, and manmade drainage or irrigation ditches have all served to mark the outer limits of CWA jurisdiction. The Fourth Circuit's decision has vastly expanded federal jurisdiction by making all of these concepts irrelevant to the reach of the statute.

1. The Corps' Regulations Limit Jurisdiction To The Ordinary High Water Mark

The Fourth Circuit concluded that the Corps' jurisdiction reaches "'*any* branch of a tributary system that eventually flows into a navigable body of water.'" App., *infra*, 16a, quoting *Deaton*, 332 F.3d at 711 (emphasis added). Corps regulations, however, limit Corps jurisdiction in non-tidal waters to the ordinary high-water mark ("OHWM") and make clear that CWA jurisdiction ends when the OHWM is no longer discernable. 33 C.F.R. § 328.4; App. *infra*, 62a; see also, *e.g.*, 51 Fed. Reg. at 41217 (1986); App., *infra*, 38a; 65 Fed. Reg. 12818, 12823 (2000) (drainage ditch constructed in a stream is a water of the United States "provided an OHWM is still present"); Tr. of Oral Argument to Fourth Circuit at 5 (Corps' counsel acknowledged this limitation on Corps' authority).

Thus, in order for wetlands to be jurisdictional they must be adjacent to the ordinary high water mark of a non-tidal water of the United States. 33 C.F.R. § 328.4(c); App. *infra*, 62a. Here, the district court found that the eastern I-64 ditch was ephemeral, meaning that at most times during the year it was dry. App. *infra*, 30a. A ditch that does not ordinarily have water will likely not have an ordinary high water mark, and the district court made no finding that any OHWM existed in any of the ditches and culverts in issue. Nonetheless, the Fourth Circuit—without finding the presence of an OHWM—upheld the Corps' jurisdiction. In doing so, it effectively removed, as a matter of law, the jurisdictional limitation contained in 33 C.F.R. § 328.4(c).

2. The Corps' Regulatory Guidance Distinguishes Manmade Ditches From Natural Tributaries

Corps regulations have consistently treated manmade ditches differently from natural tributaries. In 1975, man-made canals which are navigable-in-fact were considered waters of the United States, but "drainage and irrigation

ditches have been excluded." 40 Fed. Reg. 31320, 31321 (1975). The 1977 regulations specifically stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 42 Fed. Reg. 37122, 37144 (codified at 33 C.F.R. 323.2(a)(3)) (1977). The Corps explained that drainage and irrigation ditches are only regulated by the CWA at the point where they feed into navigable waters. 42 Fed. Reg. at 37127.

Even in 1986, when the Corps began regulating drainage and irrigation ditches on a case-by-case basis, the Corps did not define ditches as tributaries. 51 Fed. Reg. 41206, 41217. Instead, the Corps recognized that non-tidal drainage ditches were even further removed from navigable waters than ponds used by migratory birds. *Ibid.*

In March 2000, the Corps stated that ditches constructed in streams could be waters of the United States if they contained an OHWM, but still did not define ditches as tributaries. 65 Fed. Reg. 12818, 12823 (2000). According to current Corps guidance, ditches constructed in uplands are still generally *not* waters of the United States. *Id.* at 12824.

Nontidal drainage and irrigation ditches that are not navigable-in-fact have *always* been excluded from the general definition of the "navigable" "waters of the United States." Given this regulatory history, it is remarkable that the Fourth Circuit ignores the district court's finding of fact that the I-64 ditches were not waters of the United States. The district court found that the Corps had failed to meet its burden to prove that these ditches were tributaries. App., *infra*, at 47a. Overturning the district court's judgment, without challenging its factual conclusions, amounts to holding that *all* manmade ditches are waters of the United States as a matter of law. There is no support for this conclusion in either the statute or the regulations.

3. *Prior To SWANCC The Corps Treated The Type Of Wetlands At Issue The Same As "Isolated Waters"*

The Corps has long recognized that there is a point in natural streams above which the flow is de minimis. This point is called the "headwaters," which the Corps defines as "the point on a stream beyond which the flow of the water body is normally less than five cubic feet per second." 40 Fed. Reg. 31320, 31321 (1975); 33 C.F.R. § 330.2(d) (2003). It is undisputed that the property in this case is above the headwaters.

In the 1975 regulations, when the Corps expanded its definition of waters of the United States, the Corps only asserted jurisdiction in tributaries "up to their headwaters." 40 Fed. Reg. at 31324 (1975). In 1977, the Corps' position was that permits would "ordinarily not be required" for activities above the headwaters. 42 Fed. Reg. at 37129. However, the Corps asserted that these headwaters were now "waters of the United States" within its jurisdiction. *Ibid.* The 1977 regulations equated waters above the headwaters with isolated waters such as the ponds in *SWANCC*. 33 C.F.R. § 323.2(a)(5) (1977); 42 Fed. Reg. 37144 n.2. As the footnote makes clear, the Corps claimed authority over isolated waters and waters above the headwaters under the broad assertion of jurisdiction in 33 C.F.R. § 328.3(a)(3) over waters "which could affect" interstate commerce–a provision upon which this Court cast substantial doubt in *SWANCC*.

The Corps issued new regulations in 1986, purportedly to "clarify the scope of the 404 program." 51 Fed. Reg. at 41217. However, those regulations now required landowners to get permits for activities above the headwaters. Still, the permit regulations treated "isolated waters" and headwaters the same. 51 Fed. Reg. at 41218: 33 C.F.R. § 330.5(a)(26) (1986).

As the history of the Corps' regulations make clear, the Corps has historically treated even natural streams above the headwaters as "isolated." Areas above the headwaters are only occasionally connected to navigable waters through surface water runoff. Ecologically, high elevation wetlands are less functional than wetlands adjacent to navigable, open water. App., *infra*, 31a. The Fourth Circuit's decision endorses the Corps' exercise of jurisdiction over waters that even the Corps recognizes as being as far removed from navigable waters as the "isolated ponds" at issue in *SWANCC*.

Although this Court has held there is "no persuasive evidence" that the Corps erred in its 1974 regulations interpreting "navigable waters" as waters that are navigable in fact, have been navigable in the past, or could be made so in the future (*SWANCC*, 531 U.S. at 167), and although 1977 amendments to the CWA did no more than indicate "Congress' desire to [in addition] regulate wetlands adjacent to [such] 'navigable waters'" (*id.* at 170-171), the Corps has time and again expanded its CWA jurisdiction to waters ever more distantly and contingently connected to traditional navigable waters. It is questionable whether many of those regulatory expansions of jurisdiction, which find no reasonable basis in the language of the CWA, survive *SWANCC*. But what is clear is that even were the current regulations permissible, they would not on any plausible interpretation reach Newdunn's wetlands, connected to distant navigable waters only by remote, ephemeral, intermittent flows of rainwater runoff through a series of manmade ditches and culverts. This 30-year history of progressive regulatory overreaching, compounded by the Corps' straining of its own regulations since *SWANCC*, warrants corrective action by this Court now.

E. This Court's Guidance Is Necessary Because There Is No Consistent National Policy On CWA Jurisdiction

Due to inconsistent administrative interpretations, and resulting confusion over the extent of the Corps' CWA jurisdiction, Section 404 enforcement actions make up approximately 75% of the Corps' reported 5,500 annual alleged violations of federal law under its regulatory authority. U.S. Corps of Engineers, Regulatory Program Overview, *available at* <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/oceover.htm>. Conversely, only 10% of the Corps' enforcement actions involve Rivers and Harbors Act violations, a statutory scheme where jurisdiction is more apparent.

Absent this Court's review of this case, landowners' property rights will continue to be determined on an arbitrary, *ad hoc* basis, with inconsistent results from different Corps divisions and courts throughout the country. Whether the Corps asserts jurisdiction over a particular piece of property depends upon where in the country the property is located. "Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers." 33 C.F.R. § 320.1(b). The Corps may determine its jurisdiction administratively as part of the Section 404 permit application process, or in a separate Jurisdictional Determination. 33 C.F.R. § 331.2. The Corps has established an administrative appeal process for jurisdictional determinations and permit decisions, (33 C.F.R. § 331.1 *et seq.*), in which each Corps division hears and decides the appeals from its subject district, (33 C.F.R. § 331.7(a)), without regard to previous decisions. 33 C.F.R. § 331.7(g). Administrative decisions have no precedential value even within the same Corps' district. *Ibid.* As a result, the scope of CWA jurisdiction varies widely.

Some Corps divisions require that a ditch, or natural watercourse, exhibit an ordinary high-water mark ("OHWM") in order to be considered "waters of the United States." For example, in the Mississippi Valley Division, a ditch was not considered a water of the United States because an "OHW mark was not evident." U.S. Corps of Engineers, Appeal Decision, Memphis Stone and Gravel Company, Vicksburg District, File No. 200113910 (July 19, 2002). In another case, the same division held that CWA jurisdiction did not extend to a property because the Corps failed to "clearly establish that the point of connection in the unnamed natural drain to the Calcasieu River was below the plain of the Calcasieu River OHWM." U.S. Corps of Engineers, Appeal Decision, Daniel, New Orleans District, File No. 20-010-0562 (June 20, 2001).

Similarly, the South Atlantic Division found CWA jurisdiction did not exist where "the district did not document the presence of an ordinary high-water mark." U.S. Corps of Engineers, Appeal Decision, Soundview Properties, Inc., Jacksonville District, File No. 199905468 (November 19, 2001).

On the other side of the country, the South Pacific Division finds CWA jurisdiction even though drainage from a property to navigable water did not exhibit an OHWM. U.S. Corps of Engineers, Appeal Decision, Sunrise Office Park, Los Angeles District, File No. 2001-00379 (September 7, 2001). And in another case, involving desert washes, (U.S. Corps of Engineers, Appeal Decision, Molycorp, Inc., Los Angeles District, File No. 2000-01678 (August 16, 2001)) the appeals officer concluded that the "policy position that a tributary connection can exist in the absence of a continuous ordinary high-water mark is reasonable." *Ibid.* Accordingly, the appeals officer upheld jurisdiction despite the fact that there was no OHWM in the desert washes. *Ibid.*

In other Corps Divisions abrupt changes make predicting CWA jurisdiction impossible. In 2000, the Great Lakes and Ohio River Division held that a drainage ditch was not a tributary, and therefore not a 'water of the United States', if it merely conveyed "runoff from climatic factors" to navigable waters. See U.S. Army Corps of Engineers, Appeal Decision, Evangelista, Detroit District, File No. 00-010-030-0 (August 25, 2000).

A year later, the same Corps Division adopted a conflicting position on CWA jurisdiction. See U.S. Corps of Engineers, Appeal Decision, NEC Transit/Williams, L.L.C., Buffalo District, File No. 2000-00325(2) (August 30, 2001). In that case, the appeals officer determined that the subject wetland had "no discernable outlet for water flow and no evidence that water ever flows from the wetland." *Ibid.* The appeals officer found only that the wetland was in "close proximity" to other wetlands, and contained "similar vegetation and soils." *Ibid.* These wetlands displayed "no discernable channel or wetland soils in the area where water overflowed." *Ibid.* In fact, water overflows occurred so "rarely or with such low velocity that it leaves no evidence of flow through erosive forces." *Ibid.* Nonetheless, CWA jurisdiction was found to exist.

A North Atlantic Division appeals officer recently upheld CWA jurisdiction where rainwater flowed down a grass upland slope and a portion of a wetland into a culvert that ran underneath a road and into an intermittent stream which was a tributary of the Hudson River. See U.S. Corps of Engineers, Appeal Decision, E. Tetz & Sons, Inc. and Concrete Properties, New York District, File No. 2000-00117 (June 24, 2003).

The landowner argued that less than a year earlier, the same appeals officer, in U.S. Corps of Engineers, Appeal Decision, Meehan, New York District, File No. 2002-00023 (November 19, 2002), had rejected the Corps' assertion of

CWA jurisdiction because the Corps had failed to prove the existence of an OHWM in a manmade drainage ditch. The appeals officer refused to explain or justify his sudden change of position and merely pointed out that the Corps' regulations "expressly prohibit citation of a prior appealed decision in any other administrative appeal." Tetz & Sons, *supra*.

The Corps' inconsistent, case-by-case approach to CWA jurisdiction is particularly troublesome because judicial review of the Corps' jurisdiction is only available after the landowner completes the application process or the Corps brings an enforcement action. *Southern Pines Assoc.* v. *United States*, 912 F.2d 713 (4th Cir. 1990) (holding that CWA provides clear and convincing evidence that Congress intended to bar pre-enforcement review); *Hoffman Homes* v. *United States*, 902 F.2d 567 (7th Cir. 1990) (same).

The application process for a Section 404 permit is costly and time consuming. The petitioner in *SWANCC*, for example, amassed an administrative record of 46,000 pages and battled with the Corps for over 13 years before this Court held that the Corps had no jurisdiction over the property. See Oral Argument Transcript at 16-17, *SWANCC*, *supra*. The average process time for those that complete the application process is 373 days. See V. Albrecht & B. Goode, Wetland Regulation in the Real World (Feb. 1994). Unfortunately, most landowners do not complete the application process. *Ibid* (reporting that the majority of individual permit applications are withdrawn). Each day countless landowners must decide whether to embark upon a lengthy and costly application process, give up their property rights, or risk an enforcement action. Under current Corps practices, it is impossible for a landowner to make a rational, informed decision.

The vastly differing and contradictory positions reflected in the administrative process demonstrate that the Corps has

no consistent national policy on CWA jurisdiction. Without clear guidance from this Court, landowners' property rights will continue to be controlled by arbitrary administrative decisions that vary from location to location and time to time.

F. The CWA Does Not Authorize The Corps To Exercise General Land Use Regulation, Which Congress Expressly Reserved For State And Local Governments

Section 404(a) grants the Corps authority to issue permits for the discharge of dredged or fill material at "*specified disposal sites.*" 33 U.S.C. § 1344(a); App., *infra* at 58a. Nothing in the plain text of Section 404 manifests Congress' intent to delegate to the Corps the authority to regulate general land use activities. To the contrary, Congress expressly set forth its policy to "recognize, preserve and protect the primary responsibilities and rights of States to * * * plan development and use [ ] of land." 33 U.S.C. § 1251(b), App., *infra*, 57a.

Pursuant to the current regulations, the Corps claims the authority to issue permits for the construction of homes, shopping centers, airports, and roads. These are not "disposal sites." They are general development activities fully and properly regulated by state and local governments.

Newdunn does not want to operate a disposal site; it wants to develop its property. However, the Corps' Section 404 permit process requires Newdunn to demonstrate to the satisfaction of the Corps that there are no practicable alternative sites that Newdunn could develop. 40 C.F.R. § 230.10. How, when, and where a landowner should be permitted to develop property is a land-use issue that Congress left to state governments. 33 U.S.C. § 1251(b), App., *infra*, 57a.

If any artificial drain or ditch would extend the Corps' jurisdiction, localities, as they seek to control rain-water

runoff, would constantly be expanding federal jurisdiction over new lands. There is no evidence that Congress intended to wrench this authority from local government and give it to the Corps. To the contrary, "[t]he conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." 118 Cong. Rec. 33699 (1972). The legislative history shows that Congress intended for the Corps to deal with the discharge of dredged materials into navigable waters, much as it did under the Rivers and Harbors Act.

In reality, the regulatory scheme that has arisen due to the Corps' claim of Section 404 jurisdiction is unparalleled in its inconvenience and burden to the landowners. See V. Albrecht & B. Goode, Wetland Regulation in the Real World (Feb. 1994). If the Corps is allowed to extend CWA jurisdiction to every roadside ditch in the country then every local land use decision would be subject to federal review and control. This would be directly contrary to Congress' express goal to "recognize, preserve and protect the primary responsibilities and rights of States to * * * plan development and use [ ] of land." 33 U.S.C. § 1251(b), App., *infra*, 57a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 02-1480 & 02-1594

DENNIS H. TREACY, Director,
Department of Environmental Quality;
STATE WATER CONTROL BOARD,
Plaintiffs-Appellants,
and

UNITED STATES OF AMERICA,
Plaintiff,
v.

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES;
NORTHWEST CONTRACTORS,
Defendants-Appellees.

MARY MARGARET WHIPPLE, Virginia State Senator;
L. PRESTON BRYANT, Virginia State Delegate;
CHESAPEAKE BAY FOUNDATION, INCORPORATED,
Amici Supporting Appellants.

NATIONAL ASSOCIATION OF REALTORS; THE NATIONAL ASSOCIATION OF HOME BUILDERS; NFIB LEGAL FOUNDATION; NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES; NATIONAL MULTI HOUSING COUNCIL; NATIONAL APARTMENT ASSOCIATION; REAL ESTATE ROUNDTABLE; BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION; FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS; INTERNATIONAL COUNCIL OF SHOPPING CENTERS,
Amici Supporting Appellees.

UNITED STATES OF AMERICA,
Plaintiffs-Appellants,
and

DENNIS H. TREACY, Director,
Department of Environmental Quality;
STATE WATER CONTROL BOARD,
Plaintiff,
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LEGAL DEFENSE FOUNDATION; FOUNDATION FOR
ENVIRONMENTAL AND ECONOMIC PROGRESS;
INTERNATIONAL COUNCIL OF SHOPPING CENTERS,
Amici Supporting Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan, Jr., District Judge.
(CA-01-508-2, CA-01-86-4, CA-01-508)

February 25, 2003, Argued
September 10, 2003, Decided

JUDGES: Before GREGORY and SHEDD, Circuit Judges, and C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Judge Gregory wrote the opinion, in which Judge Shedd and Senior Judge Beam joined.

Reversed and Remanded.

OPINION BY: Gregory

OPINION: GREGORY, Circuit Judge:

During the summer of 2001, without obtaining a permit from the Army Corps of Engineers (the "Corps") or the Virginia State Water Control Board (the "Board"), Newdunn Associates, Orion Associates, and Northwest Contractors (collectively "Newdunn") began ditching and draining wetlands on a forty-three-acre property near Newport News, Virginia (the "Newdunn Property"). Pursuant to its authority under the Clean Water Act ("CWA" or the "Act"), the Corps brought a civil enforcement action in federal district court. The Board initiated its own enforcement action in state court, premised on the Virginia Nontidal Wetlands Resources Act of 2000 (the "Virginia Act"). Newdunn removed the state action to federal court, and the two cases were consolidated. After a five-day bench trial, the district court ruled for Newdunn in both cases, finding that the Corps lacked jurisdiction over wetlands on the Newdunn Property under the Clean Water Act, and that the jurisdictional reach of Virginia law was merely coextensive with federal law. For the reasons stated below, we reverse.

I.

In 1978, Newdunn Associates purchased forty-three acres of land located in Newport News, Virginia. It is undisputed that approximately thirty-eight acres of the Newdunn Property (the "Newdunn Wetlands") were "wetlands," as that term is defined by the Corps in its CWA regulations. 33 C.F.R. § 328.3(b) (2002) (defining "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions"). Historically, before the construction of Interstate 64 ("I-64"), the wetlands on the Newdunn Property had a natural hydrologic connection to Stony Run, which is a navigable waterway-in-fact. Presently, the Newdunn Wetlands remain connected to the navigable waters of Stony Run by the intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64). Silt-laden waters from the Newdunn Wetlands merge with clear water flowing south of the manmade ditch on the west side of I-64.

In May of 2001, following the Supreme Court's ruling in *Solid Waste Agency of N. Cook County ("SWANCC") v. United States,* 531 U.S. 159, 167, 121 S. Ct. 675 (2001), which struck down the Corps' attempted exercise of jurisdiction under its Migratory Bird Rule, Newdunn informed the Corps that it believed the Corps lacked jurisdiction over the Newdunn Property, and began filling the Newdunn Wetlands without a permit. Newdunn argued that there were no "jurisdictional" wetlands on the property, even though the property contained "scientific" wetlands. The Corps disagreed with Newdunn's interpretation of *SWANCC*, and on July 6, 2001, attempted to assert jurisdiction over wetlands on the Newdunn Property by commencing an

enforcement action in federal district court, alleging violations of sections 301 and 404 of the Clean Water Act.

Based on the same activities, and pursuant to Virginia state law, the Board issued an Emergency Special Order ("ESO"), mandating that Newdunn cease stumping and grading on its property. Va. Code. Ann. § 62.1-44.15(8b). Newdunn ignored the ESO, and as a result, on August 7, 2001, the Board filed a civil enforcement action in state court, alleging violations of Va. Code Ann. § § 62.1-44.5, 62.1-44.14, 62.1-44.15, 62.1-44.15:5, 62.1-44.23, and 62.1-44.32 (2001). Newdunn removed the Board's action to federal court. The Board, claiming that the district court was without jurisdiction to consider its case, filed a motion to remand. The court denied the Board's motion, and the Corps' and the Commonwealth's cases were consolidated for a five-day bench trial in March of 2002.

As to the federal suit, the district court held that the Corps' wetlands regulations were invalid because they exceeded Congress' grant of authority to the Corps under the Clean Water Act. On the state suit, the court ruled that the Commonwealth "has been unable to show that the Virginia Legislature has, at this time, granted regulatory authority independently of the Corps' jurisdiction." Accordingly, the district court determined that the Commonwealth lacked jurisdiction over the Newdunn Wetlands, since its authority was presumably coextensive with the Corps'. This consolidated appeal followed.

II.

We review *de novo* both the district court's statutory interpretation of the Clean Water Act, *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 448 (4th Cir. 1996), and the district court's conclusion that it had subject matter jurisdiction over the Commonwealth's enforcement action, *In re Celotex Corp.*, 124 F.3d 619, 625 (4th Cir. 1997). We review any factual findings of the district

court for clear error. *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 284 (4th Cir. 2002).

III.

A.

Before reaching the merits of either case, we must first determine whether we have jurisdiction over the Board's enforcement action premised on Virginia law. In cases where state law creates the cause of action, federal question jurisdiction is "unavailable unless it appears that some substantial, *disputed* question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S. Ct. 2841 (1983) (emphasis added). For a federal issue to be both a necessary and disputed element, "the vindication of a right under state law [must] *necessarily* turn[ ] on some construction of federal law." *Id.* at 9 (emphasis added).

In the present case, the district court noted that both the Virginia state statute and the Corps' federal regulations define "wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b); Va. Code Ann. § 62.1-44.3. Based on this shared scientific definition,[1] the district court concluded "that

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[1] It is, of course, unexceptional that Virginia would elect to take advantage of the Corps' vast technical resources in elucidating the scientific meaning of "wetlands," while at the same time making its own, unrelated decision on when and where to exercise jurisdiction over those wetlands. As Henry R. Butler and Jonathan R. Macey have observed:

> One real source of economies of scale associated with centralization of environmental regulation could be in centralized research on technical, scientific issues that recur throughout a number of different states . . . . These economies

(Continued on following page)

the state statute is coextensive with the CWA." In making this finding, however, the district court confused the definition of "scientific wetlands" and "jurisdictional wetlands."

Newdunn concedes, and the district court recognized, that at least thirty-eight acres of the Newdunn Property contained "wetlands" as that term is used in both 33 C.F.R. § 328.3(b) and Va. Code Ann. § 62.1-44.3. Thus, from a scientific perspective, there is no *disputed* federal question as to whether the Newdunn Property contains wetlands.[2] Because the resolution of this case in no way turns upon any interpretation of 33 C.F.R. § 328.3(b), there can be no federal question jurisdiction based on Virginia's decision to adopt the Corps' technical definition of wetlands. *See Franchise Tax Bd.*, 463 U.S. at 9. Stated differently, the issue is not

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can be realized by the federal government even when most policy-making and implementation functions are handled by the states.

Henry R. Butler & Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* 26 (1996).

[2] In fact, even if this case did involve a dispute over the scientific definition of wetlands, it is doubtful that the conflict would raise a question of federal law. Importantly, the General Assembly did not reference or cite to federal law in its definition of wetlands. Rather, it merely parroted the language from the federal regulation in Va. Code Ann. § 62.1-44.3. The fact that a state law might mimic the wording of a federal law, of course, does not transform interpretation of the state statute into a federal question.

Many states, for example, have "little NEPAs" on their books, which are based on language found in federal law. *See* Bradley C. Karkkainen, "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance," 102 *Colum. L. Rev.* 903, 905 (2002) (noting that the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, "has inspired dozens of 'little NEPAs' at the state and local levels"). Notwithstanding the presence of mirrored language, courts applying those statutes are interpreting state, not federal, law.

whether the Newdunn Property contains wetlands, but whether those wetlands are within the jurisdiction of the State Water Control Board. The answer to this question is resolved solely by looking to the Virginia Wetlands Resources Act of 2000, codified at Va. Code Ann. §§ 62.1-44.3, 44.5, 44.15, 44.15:5, 44.29 (2001).

The Virginia Act was crafted after this circuit announced its decision in *United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997), and after the D.C. Circuit invalidated the Corps' *Tulloch* rule, which had allowed the Corps to regulate incidental fallback as a pollutant added to a wetland, *see Nat'l Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). Following *Wilson* and *National Mining*, and the subsequent loss of federal control over Virginia's wetlands, nearly 10,000 acres of nontidal wetlands were drained or were set to be drained in a period of less than six months. *See* Tyler Whitley, "Nontidal Wetlands Rules Bill Expected," *Richmond Times-Dispatch*, Dec. 1, 1999, at B4.[3] Although Virginia was losing wetlands at a dramatic pace, the State Water Control Board was largely without authority to act. Interpreting then-existing state law, former Attorney General Mark Earley opined, "[T]he Board [did] not have authority to regulate wetlands beyond that contemplated by the § 401 certification process" found in the CWA. 1999 Op. Va. Att'y Gen. 179.

Subsequent to this 1999 opinion, environmentalists petitioned the Virginia General Assembly to fill the regulatory vacuum. Delegate L. Preston Bryant, Jr., responded to this call, and co-patroned a bill to provide the state with a comprehensive, nontidal wetlands permitting

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[3] As *Wilson* and *National Mining* make clear, the district court erred when it wrongly assumed that, prior to the Supreme Court's ruling in *SWANCC*, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), the Corps enjoyed "seemingly unlimited jurisdiction."

program. In a letter to then-Governor James S. Gilmore, III, Delegate Bryant explained the need for his proposal as follows:

> For many years, the federal wetlands permitting program has fluctuated in its ability to protect Virginia's nontidal wetlands. This fluctuation has resulted not only from changing administrations and policies within the federal U.S. Army Corps of Engineers, but more recently from changing federal case law . . . . *A comprehensive state program would remove the uncertainty created by changing federal policies and case law decisions.*

Letter from L. Preston Bryant, Jr., Delegate, to James S. Gilmore, III, Governor (Dec. 3, 1999) (quoted in Br. of Amici Curiae Sen. Whipple, et al. at 19). Delegate Bryant's bill was ultimately passed into law, becoming the Virginia Act at issue in this case. *See* S. 648, 2000 Gen. Assem., Reg. Sess. (Va. 2000); H.D. 1170, 2000 Gen. Assem., Reg. Sess. (Va. 2000) (amending Va. Code Ann. §§ 62.1-44.3, 44.5, 44.15, 44.15:5, 44.29). Newdunn posits that the Virginia Act was crafted narrowly to close only the *Tulloch* loophole, and not to broaden the Board's jurisdiction within the Commonwealth. The plain text of the Virginia Act, however, belies this contention. Virginia law defines "state waters" broadly to include "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, *including wetlands*." Va. Code Ann. § 62.1-44.3 (emphasis added). The words "including wetlands" were added to the statute by the Virginia Act, without any jurisdictional limitation. S. 648, 2000 Gen. Assem., Reg. Sess. (Va. 2000); H.D. 1170, 2000 Gen. Assem., Reg. Sess. (Va. 2000). In "state waters," Virginia law prohibits excavating, draining, filling, dumping,

or any other activity that may significantly alter or degrade a wetland without a permit issued by the Board. *See* Va. Code Ann. § 62.1-44.5. Nothing in the Virginia Act refers to the CWA's definition of "navigable waters" or the "waters of the United States." A plain reading of the Virginia Act, therefore, makes it inconceivable that the term "wetlands" as it is used in the state legislation could necessarily turn on the resolution of a question of federal law.[4]

Alternatively, Newdunn maintains that the Board's jurisdiction depends on a resolution of federal law because

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[4] In fact, if there were any doubt as to the meaning of the text, the legislative history of the Virginia Act makes it abundantly clear that the legislation was crafted, not to incorporate the CWA's jurisdictional limits, but rather to remedy perceived shortcomings with the jurisdictional reach of federal law.

During the 2000 General Assembly session, legislators rejected a proposal that would have limited the Board's jurisdiction to those wetlands "that are subject to federal jurisdiction under the federal Clean Water Act." *See* Legislative History of S. 695, Gen Assem. Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm; Legislative History of H.D. 1246, 2000 Gen. Assem., Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm.

Instead, lawmakers adopted an initiative that defined "wetlands" without any federal jurisdictional limitation and that was crafted not only to close the *Tulloch* loophole, but also "to protect and enhance the Commonwealth's wetland resources" by charging the Board with designing regulatory programs "to achieve no net loss of existing wetland acreage and functions." *See* Legislative History of S. 648, Gen Assem. Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm; Legislative History of H.D. 1170, 2000 Gen. Assem., Reg. Sess. (Va. 2000), *available at* http://leg1.state.va.us/001/bil.htm.

As one commenter has observed, "Under Virginia's new wetlands regulations, impacts that may have been permissible to isolated wetlands under federal regulations will be limited in Virginia. This is because Virginia includes wetlands as part of its definition of 'state waters.'" Lisa Spickler Goodwin, Annual Survey of Virginia Law: Environmental Law, 37 *U. Rich. L. Rev.* 117, 143 (2002).

Va. Code Ann. § 62.1-44.15:5 provides: "Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act." Based on this statute, Newdunn posits that the Board's jurisdiction must be coextensive with the Corps'. Newdunn's theory, however, is premised on a fundamental misunderstanding of the relationship between the federal and state permitting procedures.

Section 401(a)(1) of the CWA requires an applicant for a federal permit to "provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ." The Commonwealth, by enacting § 62.1-44.15:5, has taken advantage of this federal provision, so that when federal and state laws overlap, applicants may use their state permits to satisfy the certification requirements under section 401 of the CWA. Of course, simply because a state permit carries the added benefit of satisfying a potentially applicable federal requirement does not mean that the state's jurisdictional reach turns on an interpretation of the CWA. Undoubtedly, situations will arise where a permittee needs a state permit, but no federal permit. In those situations, the state permitting process would apply without reference to the CWA.

As the Supreme Court of Virginia recognized, "The CWA and federal regulations allow a state program to operate a discharge elimination system program in place of the federal program, provided that the state program is authorized under state law and has standards that are *at least* as stringent as the federal ones." *State Water Control Bd. v. Smithfield Foods,* 542 S.E.2d 766, 768 (Va. 2001) (emphasis added). That is, for a state's permitting procedure to satisfy the federal requirements of 33 U.S.C. § 1342(a), the state law must be "at least" as exacting as the Clean Water Act, but of course, it may be more demanding.

Even when state and federal requirements do overlap, as was the case in *Smithfield Foods*, the issue of whether the Board has authority to regulate the subject wetlands remains a question of Virginia law. Accordingly, the Board's jurisdiction cannot "necessarily depend" on any interpretation of federal law, even if it happens that federal and state laws are coextensive on the particular facts of a certain case. *See Franchise Tax Bd.*, 463 U.S. at 13.

The Virginia Supreme Court's finding in *Smithfield Foods* that "the interests and rights of both the [federal and state] entities were vested in a single permit" does not alter this analysis. *See Smithfield Foods,* 542 S.E.2d at 770. In *Smithfield Foods*, because this court had already "affirmed the finding of the district court that Smithfield was liable," and because the United States Supreme Court denied *certiorari*, the federal determination was a final judgment for the purposes of *res judicata*. *Id.* at 768. In the present case, while the Corps and the Board may ultimately require Newdunn to obtain the same discharge permit, no final judgment in either case has been rendered.

Depending upon how the Corps and Newdunn resolve the federal case on remand, the Board's interest may or may not be satisfied. Accordingly, the Board should be permitted to pursue its rights in a Virginia court. Of course, if either the state or federal actions were to result in a final judgment requiring the issuance of a permit satisfying both federal and state laws, then Newdunn might elect to file a motion to have the unresolved action dismissed on the grounds of *res judicata*. *See Smithfield Foods,* 542 S.E.2d at 771.

In sum, in light of the Virginia Act's clear statutory language, it is apparent that "Virginia now regulates activities in wetlands beyond its federal mandate." Goodwin, Annual Survey of Virginia Law, 37 *U. Rich. L. Rev.* at 141. It would be perverse, therefore, for this court to conclude that the jurisdictional limits of the Virginia Act depend upon the

CWA. Any determination as to the extent of the Board's jurisdictional reach is purely a question of state law that does not require the resolution of any federal question. Because we lack jurisdiction over the Board's action, we reverse the district court's ruling on the Board's motion to remand, and we remand the state enforcement action to the Virginia court from which it was improperly removed.

B.

We now turn to the only case for which federal subject matter jurisdiction exists -- the Corps' civil enforcement action premised on the CWA.

The Federal Water Pollution Control Amendments of 1972, known collectively as the Clean Water Act, were crafted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). To achieve this ambitious goal, Congress mandated that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with the Act's permitting procedures. *Id.* § 1311. The permitting scheme at issue in this case is articulated in section 404(a), which gives the Corps the authority "to issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* § 1344(a). The CWA defines "navigable waters" to include "the waters of the United States, including the territorial seas," *id.* § 1362(7), and the Corps' regulatory jurisdiction is limited by this definition.

In 1985, the Supreme Court ruled that the Corps possessed the authority to exercise jurisdiction over wetlands that were adjacent to other waters, even though the wetlands themselves were not navigable waters-in-fact. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S. Ct. 455 (1985). The Court deferred to the Corps' technical expertise on the matter, noting the considerable difficulty, both for the Corps and for federal courts, in defining the

jurisdictional limits of the Act. *Id.* at 132. The Court explained:

> In determining the limits of power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs -- in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Id. The Corps had determined that wetlands adjacent to other waters should be included in the definition of "waters of the United States," because "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 134-35. The Supreme Court upheld the Corps' exercise of jurisdiction, concluding, "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States -- based as it is on the Corps' and the EPA's technical expertise -- is unreasonable." *Id.* at 134.

The Supreme Court has recently reaffirmed *Riverside Bayview Homes*, commenting: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167; *see also United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002) (observing that the *SWANCC* Court "reaffirm[ed] its prior holding [in *Riverside*

Bayview Homes] that Section 404 encompassed non-navigable wetlands adjacent to navigable waters," but "explicitly declined to further determine the exact meaning of 'navigable waters'"). In *SWANCC*, the Court struck down the Corps' so-called "Migratory Bird Rule," which defined "waters of the United States" to include intrastate waters, "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or . . . [w]hich are or would be used as habitat by other migratory birds which cross state lines . . . ." *SWANCC,* 531 U.S. at 164 (quoting 51 Fed. Reg. 41217). Quoting *Riverside Bayview Homes*, the Court held that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably* bound up with the "waters" of the United States.'" *Id.* at 167 (emphasis added). Thus, the Corps' attempted exercise of jurisdiction over isolated ponds that had no hydrologic connection whatsoever to navigable waters could not stand.[5]

Along similar lines, this court has previously held that the phrase "waters of the United States" cannot be used by the Corps to assert jurisdiction over intrastate, nonnavigable waters, solely on the ground that those waters could possibly affect interstate commerce. *United States v. Wilson,* 133 F.3d

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[5] As is evident from the above discussion, Newdunn's insistence that *SWANCC* limited the Corps' jurisdiction solely to those wetlands adjacent to navigable waters-in-fact is plainly incorrect. Unlike the administrative regulation at issue in *Riverside Bayview Homes*, the "Migratory Bird Rule" before the Court in *SWANCC* was not developed to clarify the scientifically nebulous point "at which water ends and land begins." *Riverside Bayview Homes*, 474 U.S. at 134. Instead, the Corps' supposed justification for the rule was purely legal – that Congress drafted the CWA with the intention of defining "waters of the United States" as broadly as possible under the Commerce Clause. The Court rejected the Corps' interpretation of the CWA, recognizing that the Corps' Commerce Clause argument would read the phrase "navigable waters" completely out of the statute. *SWANCC*, 531 U.S. at 172.

251, 253-54 (4th Cir. 1997). We explained, "To include intrastate waters that have *nothing* to do with navigable or interstate waters, expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Id.* at 257-58 (emphasis added). Accordingly, we struck down 33 C.F.R. § 328.3(a)(3), because it attempted to give the Corps jurisdiction over any waters, "the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." *Id.* at 257 (quoting 33 C.F.R. § 328.3(a) (1993)). As we held in *Wilson*, and as the Supreme Court affirmed in *SWANCC*, the Corps' jurisdiction does not extend to the limits of the Commerce Clause. Rather, the critical, limiting term is 'navigable waters,' as that term is defined in 33 U.S.C. § 1362(7).

In the present case, the Corps asserts jurisdiction over navigable waters (33 C.F.R. § 328.3(a)(1)), tributaries of navigable waters (§ 328.3(a)(5)), and "[w]etlands adjacent to waters (other than waters that are themselves wetlands) . . ." (§ 328.3(a)(7)). The Corps defines "adjacent" to mean, "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c). This circuit has recently concluded that, pursuant to these regulations, the Corps intends to assert jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water." *United States v. Deaton,* 332 F.3d 698, 711 (4th Cir. 2003). In *Deaton*, the Corps claimed authority to regulate wetlands bordering a "roadside ditch" that took "a winding, thirty-two mile path to the Chesapeake Bay." *Id.* at 702. Along the way to the Bay, water flowed from the Deaton's wetlands to the roadside ditch, and then into a "culvert" on the other side of the road. *Id.* Water from the culvert drained into a second ditch, which flowed into Beaverdam Creek. Beaverdam Creek was "a direct tributary of the Wicomico River, which [was] navigable." *Id.* The

distance from the Deaton's wetlands to a navigable-in-fact river was approximately eight miles. The *Deaton* court upheld the Corps' exercise of jurisdiction over all of these waters, finding that "the Corps's regulatory interpretation of the term 'waters of the United States' as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework." *Id.* at 708. In dismissing a Commerce Clause challenge to the Corps' regulations, the *Deaton* court summarized Congress' well-articulated purpose for crafting the CWA and concluded, "The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters." *Id.* at 707. In sum, the Corps' unremarkable interpretation of the term "waters of the United States" as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.

To the extent that Newdunn challenges the Corps' decision to label the manmade, I-64 ditch a "tributary," that argument has also been foreclosed by *Deaton*. The *Deaton* court recognized that the Corps has defined the word "tributary" to include "the entire tributary system," including roadside ditches. *Id.* at 710. As explained above, *Deaton* deferred to the Corps' definition of "tributary" because "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters." *Id.* at 712. That the I-64 ditch at issue in the present case is a manmade rather than a natural watercourse is an irrelevant distinction. As the Corps has explained:

> The discharge of a pollutant into a waterway generally has the same effect downstream

> whether the waterway is natural or manmade. Indeed, given the extensive human modification of watercourses and hydrologic systems throughout the country, it would be difficult to identify a principled basis in this case for distinguishing between natural watercourses and watercourses that are wholly or partly manmade or modified.

(Br. for the United States at 48-49.) This observation is particularly meaningful in the present case, where the United States has extensively documented the connection between the Newdunn Property's wetlands and the navigable waters, both before and after the construction of I-64. Because of this long-standing connection, it would be illogical to conclude that, prior to the existence of I-64, the Newdunn Wetlands would have been within the ambit of the Corps' regulations, but that now, with the construction of the highway, the wetlands are no longer jurisdictional.

As stated before, the CWA's primary objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). If this court were to conclude that the I-64 ditch is not a "tributary" solely because it is manmade, the CWA's chief goal would be subverted. Whether manmade or natural, the tributary flows into traditional, navigable waters. Accordingly, the Corps may permissibly define that tributary as part of the "waters of the United States." *See* 33 U.S.C. § 1362(7).

Turning our attention to the specific wetlands at issue in this case, it is undisputed that water flows intermittently from wetlands on the Newdunn Property through a series of natural and manmade waterways, crossing under I-64, draining into the west arm of Stony Run, and eventually finding its way 2.4 miles later to traditional navigable waters.

As the district court found, Stony Run is "navigable-in-fact" because the "lower reaches of Stony Run are subject to the ebb and flow of the tide." The court further found that "Stony Run flows into the Warwick River, which intersects with the James River, which intersects with the Hampton Roads Harbor, which intersects with the Chesapeake Bay." These factual findings are supported in part by photographic evidence of silt-laden water flowing from the subject property into Stony Run. Because there exists a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact, the Corps' jurisdiction in this case is amply supported by the Act and the Corps' regulations under the Act.

IV.

For the reasons stated above, the ruling of the district court is reversed. We remand the Board's state enforcement action directly to the Virginia state court from which it was improperly removed. We remand the Corps' enforcement action to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 2:01cv508

United States of America,
Plaintiff,

v.

Newdunn Associates LLP, Orion Associates,
and Northwest Contractors Corporation
Defendants.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 4:01cv86

Dennis H. Treacy, Director
Commonwealth of Virginia
Department of Environmental Quality
And State Water Control Board,
Plaintiffs,

v.

Newdunn Associates LLP, Orion Associates,
and Northwest Contractors Corporation
Defendants.

April 3, 2002, Decided
April 3, 2002, Opinion Filed

OPINION BY: HENRY COKE MORGAN, JR., UNITED STATES DISTRICT JUDGE

OPINION:

OPINION AND ORDER

The parties come before the Court in these consolidated cases for a non-jury trial, seeking to resolve issues surrounding the Defendant's activities on the forty three (43) acre parcel of land located at the intersection of Industrial Park Drive and Jefferson Avenue in Newport News, Virginia (the "Property" or the "Newdunn Property"). At the conclusion of the trial on March 8, 2002, the Court ruled from the bench that the United States Army Corps of Engineers (the "Corps") did not have jurisdiction to regulate the Property. The Court also ruled that Plaintiff Dennis Treacy ("Treacy"), Director of the Virginia Department of Environmental Quality ("VDEQ"), acting on behalf of the State Water Control Board (the "Board"), possessed no jurisdiction over the Property independent of the Corps' claim of jurisdiction. This order further explains the reasoning of the Court's decision.

I. Factual and Procedural Background

Newdunn Associates, LLP ("Newdunn" or the "Defendants") is the owner of the Property at issue in this case. On May 21, 2001, the Corps issued a second jurisdictional determination that the Newdunn Property contained wetlands which are waters of the United States and any filling would require a "404 permit," pursuant to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a). From approximately June 12, 2001 through July 12, 2001, Newdunn and/or persons acting on their behalf, conducted, contracted for, supervised and/or otherwise controlled the discharge of dredged or fill material onto the Newdunn Property without a permit under CWA section 404. On June 14, 2001 and June 16, 2001, the Corps issued a cease and desist order to the Defendants. On June 25, 2001, the Board issued Newdunn an Emergency Special Order ("ESO")

directing Newdunn Associates to cease all excavation on the Property. Believing that the Corps lacked jurisdiction over the Property and that their activities did not violate state law, the Defendants elected not to comply with these orders.

On July 6, 2001, the United States filed a Complaint in *United States v. Newdunn Associates, et. al.,* Civil Action No. 2:01cv508, seeking *inter alia* an injunction barring the Defendants from discharging dredged or fill material into the Property without a permit. On July 13, 2001, the Court granted the motion by the United States for a Temporary Restraining Order ("TRO") enjoining the Defendants from conducting any filling or related activity on the Property for a period of ten (10) days. On July 23, 2001, after conducting an evidentiary hearing and viewing the Property, the Court granted a Preliminary Injunction ("PI") with significant modifications to the July 13, 2001 TRO. With certain conditions regarding, amongst other things, the maintenance of a buffer strip of wetlands on the perimeter of the Property and the construction of a ditching system to minimize surface water runoff, the Court lifted the prohibition on the Defendant's activities. The Court indicated at that time that the paramount issue in this case was whether the Corps had jurisdiction to regulate the Property.

From late July, 2001 through approximately September 30, 2001, Defendants and/or persons acting on their behalf conducted, contracted for, supervised and/or otherwise controlled the use of mechanized land-clearing and earth moving equipment to discharge dredged or fill material into a portion of the wetlands on the Newdunn Property.

On July 30, 2001, the Court filed a written Order explaining the July 23, 2001 Preliminary Injunction. The Corps, unsuccessful in its attempt in this Court to enjoin Newdunn's filling activities, then conferred with the state regulatory body, the VDEQ. The day after the Court entered the Preliminary Injunction, Treacy notified Newdunn that it

could not excavate ditches on the Property[6] and followed this notice with a civil action in the Circuit Court of the City of Newport News, Virginia, seeking to enjoin the excavation ordered by this Court.[7] Prior to VDEQ's filing this state court claim, Newdunn filed *Newdunn Associates, L.L.P. v. Dennis H. Treacy and Bert W. Parolari, Jr.*, Civil Action No. 2:01cv575, in which Newdunn sought to enjoin Treacy and Parolari, as state officials, from proceeding with plans to seek injunctive relief in state court regarding Newdunn's ditching activities on the Property. On August 8, 2001, Newdunn also filed a petition to remove the state action to this Court, which had been designated *Dennis H. Treacy and State Water Control Board v. Newdunn Associates, L.L.P.*, Civil Action No. 4:01cv86.

In an Order entered in Civil Action No: 2:01cv575 on August 9, 2001, this Court issued a TRO enjoining Treacy and Parolari from instituting any proceeding in state court against Newdunn relating to activities authorized by the PI

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[6] In July, 2001, the statute upon which the VDEQ relied, Va. Code § 62.1-44.5 and 62.1-44.15:5, did not prohibit the filling of wetlands. As conceded by the VDEQ, as of July, 2001, this statute only barred the excavation of wetlands. The portion of the statute prohibiting excavation became effective July 1, 2000 in accord with normal scheduling of effective dates by the Virginia legislature. However, the statute specifically contains a delayed effective date for the prohibition of filling wetlands until October 1, 2001, thereby intentionally creating a window of opportunity for owners, such as Newdunn, to fill property alleged to be wetlands.

[7] The City of Newport News had also previously and conditionally approved excavation on the Property as part of a drainage plan. When it was brought to the Court's attention that a more extensive ditching plan had been ordered by the City of Newport News, by modification of its Preliminary Injunction in Civil Action No. 2:01cv508, on August 22, 2001, the Court permitted the more extensively and presumably more scientifically sound system of ditching approved by the City of Newport News to be substituted for the Court's ditching plan.

and ordered them to appear and show cause why such state court proceeding would not be controlled by Civil Action No. 2:01cv508, which was pending in this Court. In a tele-conference hearing held on August 10, 2001, this Court rejected the state's request to dissolve or modify this TRO.

On August 8, 2001, Treacy and Parolari moved to dismiss *Newdunn v. Treacy, et. al.*, Civil Action No. 2:01cv575. On August 17, 2001, the United States filed a Motion to Enforce the Preliminary Injunction in *United States v. Newdunn, et. al.*, Civil Action No. 2:01cv508. On August 20, 2001, Newdunn moved in Civil Action No. 2:01cv575 to convert the August 9, 2001 TRO into a PI. The Court heard evidence and arguments on these interrelated motions on August 20, 2001.[8] In an Order filed August 22, 2001, the Court extended the TRO for an additional 10 days, ordered Newdunn to obtain a bond with sufficient surety or obtain an appropriate letter of undertaking from a bank in the principal sum of one-hundred and fifty thousand dollars to cover the potential cost of reversing its excavation activities and ordered a hearing upon Newdunn's request for a Preliminary Injunction be held on August 30, 2001. Further, the Court dismissed Parolari as a party to the suit.

On August 23, 2001, Treacy moved to remand Civil Action No. 4:01cv86 to the Newport News Circuit Court. The Court heard arguments on this motion as well as Newdunn's motion to convert the August 9, 2001 TRO to a Preliminary Injunction on August 30, 2001. In an Order filed

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[8] At the August 20, 2001 hearing, counsel for VDEQ issued a thinly veiled threat that, should the Court lift the TRO, it would proceed with other legal actions against Newdunn, including possible criminal actions. When pressed further by the Court, VDEQ counsel, an Assistant Attorney General, refused to either confirm or deny that criminal action was contemplated. Given the complexities of these civil actions, the Court found that the threat of criminal proceedings placed Newdunn in an untenable position.

August 31, 2001 in Civil Action No:201cv575, the Court found preliminarily that (1) Treacy relied on the Corps' assertion of jurisdiction over the Property via the CWA in his attempt to assert jurisdiction to enjoin the excavation of ditches and, (2) Treacy's proffered evidence was insufficient to establish that Newdunn's filling and subsequent excavation activities authorized in the Court's July 30, 2001 Preliminary Injunction was in violation of state statute, Va. Code §§ 62.1-44.5 and 62.1-44.15:5, and (3) as of October 1, 2001, Treacy had independent jurisdiction over further filling activity provided that Treacy also had independent jurisdiction over the Property. Further, the Court converted the TRO into a Preliminary Injunction with modifications, and thereby enjoined Treacy from instituting any proceeding in state court against Newdunn related to activities authorized by the Corps' Preliminary Injunction issued by the Court on July 30, 2001 and modified on August 22, 2001 in Civil Action 2:01cv508. The Court set an expiration date for the Treacy Preliminary Injunction of October 1, 2001.

In an Order filed September 5, 2001 in Civil Action No. 4:01cv86, the Court again found that Treacy relied on the Corps' assertion of jurisdiction over the Property via the CWA in his attempt to assert jurisdiction to enjoin the excavation of ditches. In that Order the Court denied Treacy's Motion to Remand.

On October 4, 2001, the Board affirmed the Emergency Special Order ("ESO") and held that Newdunn was in violation of Va. Code § 62.1-44 *et seq.* The Board issued a Final Special Order ("FSO") on October 11, 2001 ordering Newdunn to cease its activities on the Property. Both the ESO and FSO listed as the first Finding of Fact that the Corps had jurisdiction over the Property under the CWA.

On October 26, 2001, Treacy moved for Voluntary Dismissal Without Prejudice of Civil Action No. 4:01cv86. On October 29, 2001, Newdunn moved to Consolidate Civil

Action No. 2:01cv 508 and Civil Action No. 4:01cv86. On November 7, 2001, Newdunn moved for a Preliminary Injunction to prevent VDEQ from taking any further state administrative actions involving Newdunn's activities on the Property before October 1, 2001. On November 7, 2001, Treacy moved for partial summary judgment against Newdunn on the issue of liability based upon the outcome of the state administrative hearings. The Court held a hearing on these matters on December 11, 2001. In an Order filed December 21, 2001, the Court adhered to its finding that Treacy's exercise of jurisdiction was dependent upon the Corps' alleged jurisdiction under the CWA. Further, the Court (1) denied Treacy's Motion to Voluntarily Dismiss without Prejudice Civil Action No. 4:01cv86, (2)granted Newdunn's Motion to Consolidate Civil Action No. 2:01cv 508 and Civil Action No. 4:01cv86, (3) declined to consider Treacy's Motion for Partial Summary Judgment because Treacy failed to file a statement of undisputed facts as required by Local Rule 56(B), and (4) denied Newdunn's Motion for Preliminary Injunction. Further, the Court ordered all parties to arrange a Settlement Conference with a Magistrate Judge of this Court. The Court ordered that each party be represented at said settlement conference by someone with authority to settle the case or that such a person be readily available via telephone during the conference.[9]

On February 1, 2002, the Corps filed a Motion for Partial Summary Judgment. On February 8, 2001, the Board issued a Supplemental Final Special Order ("SFSO") finding that Newdunn's activities on the Property prior to October 1, 2001 were in violation of state law. On February 13, 2002, Treacy filed a Motion for Summary Judgment based on this

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[9] The Settlement Conference was held on January 24, 2002. The parties were unable to settle the matters before the Court.

SFSO. The Corps' Motion for Partial Summary Judgment and Treacy's Motion for Summary Judgment were not considered by the Court, as they did not mature within a reasonable time before the date of trial.

The bench trial in this case began on March 4, 2002. The Corps argued that a "surface water" or "hydrological" connection exists between the wetlands on the Property and other Waters of the United States, as defined in Corps' regulations, and therefore the Corps had jurisdiction over the Property. Treacy argued that Newdunn violated Va. Code §§ 62.1-44.15:5 and 62.1-44.5 and that Treacy possessed jurisdiction over the Property independent of the Corps. Newdunn contended that the Corps' regulations exceeded the authority granted under the CWA and, in the alternative, that the Corps did not properly exercise jurisdiction under their own regulations. Newdunn also argued that Treacy possessed no jurisdiction independently of the Corps and, in the alternative, Newdunn did not violate the state statute. The Court ruled from the bench on March 8, 2002. The court indicated it was ruling for the Defendants, but that it would not enter judgment until a written opinion and order was filed.

II. Findings of Fact

1. In September and October of 1997, the Williamsburg Environmental Group, Inc. ("WEG"), an environmental consulting firm, performed a wetland delineation on the Newdunn Property at the request of Newdunn Associates. WEG determined that most of the Property constituted wetlands.

2. In September of 1999, another environmental consultant, Doug Davis of Davis Environmental Consultants, acting on behalf of Newdunn Associates, requested a jurisdictional determination and confirmation of wetlands delineation from the Corps. On December 16, 1999, the Corps provided Newdunn with a formal jurisdictional

determination that the Property contained wetlands which it believed were subject to CWA jurisdiction. The Corps also confirmed the wetland delineation submitted by Davis at this time. A determination that a property contains wetlands is defined as a delineation in Corps regulations. A determination by the Corps that it has jurisdiction over wetlands previously delineated is a separate decision.

3. On May 21, 2001, before Newdunn began the filling activities, the Corps issued a second jurisdictional determination that the Property contained wetlands which are waters of the United States. Although the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 121 S. Ct. 675 (2001) (*SWANCC*) was decided between the Corps' December 16, 1999 determination of jurisdiction and its May 21, 2001 determination, it looked at the same factors in both determinations.

4. Before Newdunn and its contractors commenced work on the Property in early June 2001, the Property contained approximately thirty-eight (38) acres of non-tidal forested wetlands.

5. From approximately June 12, 2001 through July 12, 2001, the Defendants and/or persons acting on their behalf, conducted, contracted for, supervised and/or otherwise controlled the discharge of dredged or fill material onto the Property. From about July 23, 2001 through approximately September 20, 2001, the Defendants and/or persons acting on their behalf, conducted, contracted for, supervised and/or otherwise controlled the discharge of dredged or fill material onto the Property. From early June, 2001 through September, 2001, the Defendants or persons acting on their behalf conducted, contracted for, supervised, directed and/or otherwise controlled the mechanized stumping, grading and/or grubbing of the Property. From late July, 2001 through September, 2001, the Defendants or persons acting

on their behalf conducted, contracted for, supervised, directed and/or otherwise controlled the mechanized excavation of ditches on the Property as indicated in the proposal dated May 11, 2001 which was executed by and between Orion and Newdunn and the "Drainage Improvements for Newdunn Associates, L.L.P." and submitted by Newdunn to the City of Newport News, Virginia. Newdunn conducted all of these activities without a permit under CWA § 404 or an individual or General Virginia Water Protection Permit under Va. Code §§ 62.1-44.15:5(D) and 62.1-44.5(A)(2).

6. Rain generated surface water runoff occasionally exits the Property through a spur ditch by the Property. There is no evidence of the frequency or volume of the surface water runoff. At prior hearings, the Corps had claimed a hydrological connection between the Property and Jones Run, as well as a hydrological connection between the Property and a branch of Stony Run located to the east of highway I-64. However, these alternate hydrological connections were not proven at any pretrial hearings and no evidence of either alternate connection was presented at trial. Further, at prior hearings, the Corps had claimed that surface water runoff contributed to flooding in a low lying residential area to the east of the Property. Obviously, maintaining the status quo, as urged by the Corps, would not alleviate this problem and it was not mentioned at the trial. Although reference was also made in pretrial hearings to damage to plant and animal life which occupied the wetlands on the Property, no evidence on this issue was presented at trial by the Corps. There was a mention in the State Board's February 8, 2002 Supplemental Special Final Order ("SFSO") of potential damage to plant and animal life, but neither the Corps nor Treacy asserted this as a basis for jurisdiction. Thus, the Corps' claim of jurisdiction is based solely upon the alleged surface water or hydrological connection of the Property to the navigable portion of Stony

Run and Treacy must base his claim of jurisdiction upon the enabling statute passed by the Virginia Legislature.

7. In order for the surface water which exits the Property to reach the navigable portion of Stony Run, it must traverse the following path:

> A. Enter the spur ditch leading from the Property through the adjacent VDOT wetlands approximately forty (40) feet to a manmade, drainage ditch lying adjacent and parallel to the east side of I-64 ("eastern I-64 ditch"). The eastern I-64 ditch is ephemeral, or dry most of the year.
>
> B. The surface water that continues through the eastern I-64 ditch intermittently travels approximately four hundred (400) feet in this ditch to a culvert, which runs under I-64.
>
> C. The surface water that continues through the culvert under I-64 intermittently travels approximately one hundred (100) feet through this culvert to another manmade, drainage ditch, which lies on the western side of I-64 ("western I-64 ditch").
>
> D. The surface water that continues through the western I-64 ditch intermittently travels approximately one and one third miles down the western I-64 ditch before intersecting the Western Arm of Stony Run.
>
> E. The Western Arm of Stony Run, including the point where surface water from the western I-64 ditch intermittently enters the Western Arm of Stony Run, is not navigable-in-fact.

F. The Western Arm of Stony Run intersects with the Central Arm of Stony Run approximately one thousand (1,000) feet from the point where surface water from the western I-64 ditch may intermittently enter the Western Arm of Stony Run.

G. Old Courthouse Road passes over Stony Run approximately one mile downstream from the point where surface water from the western I-64 ditch may intermittently enter the Western Arm of Stony Run.

H. Stony Run is only navigable-in-fact downstream of the Old Courthouse Road overpass. The lower reaches of Stony Run are subject to the ebb and flow of the tide. The upper limits of tidal influence reach the Old Courthouse Road overpass.

I. Stony Run flows into the Warwick River, which intersects with the James River, which intersects with the Hampton Roads Harbor, which intersects with the Chesapeake Bay.

8. The evidence shows that the wetlands contained on the Property were non-tidal high elevation hydric soil flats, which are qualitatively different and less functional than wetlands that lay closer to navigable, open water.

9. The Property averaged approximately forty six (46) feet above sea level in its natural state before any filling, ditching, grading or stumping activities began. It rested on one of the highest elevations in this generally low lying area. Thus, the wetlands on the Property did not serve to filter pollutants from I-64 or the surrounding area from entering

the Chesapeake Bay. Rather, when surface water did exit the Property, it actually traveled to the drainage ditches of I-64.

10. The Corps and Treacy have presented no evidence of any pollution, other than silt from "clean fill," exiting from the Property. There is no evidence that the silt exiting the Property as a result of Newdunn's activities on the Property actually reaches any natural watercourse or causes harm to the Chesapeake Bay or any of its "natural" tributaries.[10]

11. The Corps first promulgated regulations for the CWA on April 3, 1974 ("1974" or "old" regulations). Subsequently, it put forth revisions in 1975, 1977, and 1986 ("1986" regulations).

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[10] In fact, the Corps' position may assist pollutants from I-64 entering the Chesapeake Bay. The Corps claims that it has jurisdiction over the Property because of a "surface water connection" from a ditch on the Property, to a drainage ditch on the eastern side of I-64, through a culvert under I-64, to a drainage ditch on the western side of I-64, to Stony Run, and, eventually, into the Chesapeake Bay. Under this scenario, the Corps only claims jurisdiction because of the existence of an alleged hydrological connection from I-64 to the Chesapeake Bay. Thus, in its quest to regulate the surface water and accompanying silt from the Property, the Corps has promoted and failed to alter the path of pollutants from I-64 to the Chesapeake Bay. Pollutants emanating from I-64 should potentially cause more damage to the Chesapeake Bay than the silt from the Property. Yet, in order to protect the Chesapeake Bay from these pollutants emanating from I-64, the Corps would have to alter the hydrological connection from I-64 away from a path that leads to the Chesapeake Bay. However, if it were to make such an alteration, the Corps would no longer have a "surface water" or "hydrological" connection from I-64 to the Chesapeake Bay. Without such a connection from I-64 to the Chesapeake Bay, the Corps would have to concede that it did not have jurisdiction over the Property and similar property which are allegedly connected to the Chesapeake Bay via the ditches or culverts of I-64. Thus by attempting to maintain the status quo with regard to the Property both the Corps and Treacy are risking damage to the Bay. It was for this reason that the Court vigorously and repeatedly urged the parties to negotiate a settlement.

12. The authority granted to the Corps by Congress has not been expanded since the Corps promulgated the 1974 regulations.

13. Both the 1974 and 1986 regulations share the definition for navigable waters: "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974), 33 C.F.R. 321.2(a) (1986). Both sets of regulations include the same conditions that must be met to be considered a "navigable water."[11]

14. The 1986 regulations distinguish the applicability of the term "navigable waters" from the term "waters of the United States." The 1986 regulations state,

> "The terms 'navigable waters of the United States' and 'waters of the United States' are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. 'Navigable waters of the United States' are defined in 33 C.F.R. Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or

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[11] Specifically, the following conditions must be met:

"(1) Past, present, or potential presence of interstate or foreign commerce;

(2) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(3) Defined geographic limits of the waterbody."

33 C.F.R. 209.260(b) (1974), 33 C.F.R. 329.5 (1986).

> structures pursuant to Section 9 and 10 of the Rivers and Harbors Act of 1899. 'Waters of the United States' are defined in 33 C.F.R. Part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act." 33 C.F.R. § 320.1(d) (1986).

The 1974 regulations make no such distinction.

15. The 1986 regulations state that the definition for "waters of the United States" applies to the authority of the Corps under the CWA. 33 C.F.R. § 328.1 (1986). It also clearly states that the definition for "navigable waters" "does not apply to authorities under the Clean Water Act . . ." 33 C.F.R. § 329.1 (1986). Again, there is no such distinction in the 1974 regulations.

16. The 1986 regulations define the term "waters of the United States,"[12] which it states applies to the CWA

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[12] The 1986 regulations use the following definition for "waters of the United States":

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

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jurisdictional limits, 33 C.F.R. § 328.1 (1986), in much broader terms than the definition for "navigable waters."

17. The 1974 regulations state under "General Policies" that, "[t]he term 'navigable waters of the United States' is used to define the scope and extent of the regulatory powers of the Federal government." 33 C.F.R. § 209.260(b)(1974). The 1986 regulations do not contain this statement.

18. In several places throughout the regulations, the 1986 regulations have substituted the term "waters of the United States," where the old regulations had used "navigable waters." These changes took place in otherwise identical sections of the new and old regulations. *See e.g.* 33 C.F.R. 209.120(b)(7) (1974) and 33 C.F.R. § 209.120(b)(7) (1986); 33 C.F.R. § 209.120(c) (1974) and 33 C.F.R. § 209.120(c) (1986); 33 C.F.R. § 209.120(d)(3) (1974) and 33 C.F.R. § 323.2(c) (1986); 33 C.F.R. § 209.120(e)(2) (1974) and 33 C.F.R. § 323.3(a) (1986).

19. The 1975 regulations, in its definition of "Navigable waters," includes "All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark." 33 C.F.R. 209.120(d)(2)(i)(e)

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1)-(6) of this section." 33 C.F.R. 328.3 (1986).

(1975).[13] The 1975 regulations further define "Primary

[13] The Corps has argued in this case that the spur ditch, the I-64 drainage ditches, and the culvert all qualify as "tributaries" to "waters of the United States," making these alleged tributaries also waters of the United States. However, the Corps has also expanded the definition of the term "tributary" since the 1974 regulations:

The 1974 regulations stated, "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

The 1975 regulations stated, "(2) '*'Navigable waters.'*(i) the term 'navigable waters,' as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean waters of the United States . . . and shall include the following waters:

. . .

(e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark.

. . .

(i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not continuous or adjacent to navigable waters identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer."

. . .

(ii) The following additional terms are defined as follows:

(e) '*Primary tributaries*' means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries."

33 C.F.R. § § 209.120(d)(2)(i)(e) & (i) and (d)(2)(ii)(e) (1975).

The 1975 preamble stated, "With respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters. . . . Drainage and irrigation ditches have been excluded . . .In view of

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manpower and budgetary constraints it is necessary that this program be phased in over a two year period. . . . Thus, under Phase I, this regulation would become immediately operative in all coastal waters and contiguous or adjacent wetlands as well as inland rivers, lakes and streams that are navigable waters of the United States . . . and their contiguous or adjacent wetlands. In Phase II, which would begin on July 1, 1976, we would . . . also begin to regulate discharges of dredged or fill material in primary tributaries (the main stems of tributaries directly connecting to navigable waters of the United States), their contiguous or adjacent wetlands, and all lakes. Finally, in Phase III, all discharges of dredged or fill material in navigable waters would be regulated after July 1, 1977." 40 Fed. Reg. 31,320-321 (1975).

The 1977 regulations stated, "(a) The term 'waters of the United States' means:

. . .

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands;" 33 C.F.R. § 323.2(a)(3) and (4).

The 1982 regulations stated, "(a) The term 'waters of the United Sates' means []:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

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tributaries" as "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. § 209.120(d)(2)(ii)(e). The 1986 regulations do not have a definition of Primary tributaries, nor does it exclude "additional tributaries extending off of the main stems of these tributaries."

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section.

33 C.F.R. 323.2(a)(5) (1982).

The 1986 preamble stated, "For clarification, it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.'

(a) Non-tidal drainage and irrigation ditches excavated on dry land . . . [I]n the absence of wetlands the upstream limit of the Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible." 51 Fed. Reg. 41,217 (1986).

The 1990 preamble states, "The statement that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing waters of the United States is consistent with the final rule published in the November 13, 1986 Federal Register and applies to ditches constructed in waters or that connect waters. Nothing in the NWP notice was intended to change the November 13, 1986 Federal Register notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States." 65 Fed. Reg. 12,824-825 (2000).

20. The 1975 preamble to the regulations states, "With respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters." 40 Fed. Reg. 31,320-21 (1975).

21. The 1977 regulations stated that "Waters of the United States" means: "Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition). . . .[and] Interstate waters and their tributaries, including adjacent wetlands." 33 C.F.R. 323.2(a)(3) and (4) (1977).

22. The 1982 regulations further expanded the definition of "Waters of the United States".[14] *See* 33 C.F.R. 323.2(a)(5) (1982).

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[14] The 1982 regulations use the following definition for "waters of the United States":

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

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23. The 1986 regulations include the following passage in the preamble: "For clarification, it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. . .

(a) Non-tidal drainage and irrigation ditches excavated on dry land." 51 Fed. Reg. 41,217 (1986).

24. As noted in the Court's Order of December 21, 2001, the VDEQ continually relied on the Corps' claim of jurisdiction in its attempts to regulate the Property. In a letter dated July 31, 2001 to Newdunn's counsel, VDEQ counsel wrote that VDEQ "will continue to view the wetlands on [the Property] as wetlands subject to [state regulations] until Newdunn demonstrates that the property no longer contains wetlands, *either with a final determination from the Corps or court* that the activities that removed or covered the previously existing wetland parameters were *either authorized by the Corps or not subject to its jurisdiction or the jurisdiction of the Board.*" (emphasis added).

25. In the Emergency Special Order issued by the VDEQ on June 25, 2001, which ordered Newdunn not to excavate, the first Finding of Fact is that the Corps had determined that the Property is comprised of "jurisdictional wetlands subject to regulation under the CWA."

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section.

33 C.F.R. 323.2(a)(5) (1982).

26. Even after the Court issued its August 31, 2001 Order, the VDEQ repeated this finding. After the October 4, 2001 hearing, the Board stated in a "Final Special Order" as its first Finding of Fact that "On December 16, 1999, the U.S. Army Corps of Engineers (ACOE) notified Newdunn Associates that it had determined that the majority of the Facility is comprised of jurisdictional wetlands subject to regulation under the Clean Water Act."

27. Not until the Board entered a Supplemental Special Final Order ("SFSO") on February 8, 2002, only weeks before trial, did the Board omit reference to its dependence upon Corps jurisdiction under the CWA.

III. Conclusions of Law

1. The paramount issue in this case is whether the Corps has jurisdiction under the CWA and its regulations interpreting the Act over the wetlands on the Property under the holding in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455 (1985) (*Riverside*), in light of *SWANCC*.

2. The CWA was passed in 1972 in reaction to incidences involving heavily polluted waters, such as the burning of the Cuyahoga River cited in *SWANCC*, 531 U.S. at 175 (Stevens, J. dissenting). The overarching goal of the Act was "ending water pollution by 1985." *Id.* Following *Riverside*, courts generally allowed the act's jurisdiction to expand through Corps regulations and interpretation thereof until January of last year when the decision in *SWANCC* was announced. *SWANCC* recognized there is a limit to the Corps' unilateral expansion of the jurisdiction that the CWA conferred upon it.

3. The Supreme Court in *SWANCC* stated that "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." *Id.*

at 172. Justice Stevens cogently, if disapprovingly, described the effect of *SWANCC* when he wrote in his dissent, "[T]he Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each." *Id.* at 176.

4. Justice Stevens also observed that *SWANCC* had the effect of excluding, amongst other waters, tributaries and wetlands that are not contiguous or adjacent to navigable waters from the scope of the Corps' jurisdiction. *Id.* at 188, fn. 14. Justice Stevens discussed three "phases" of waters. "Phase 1" waters, which are navigable waters and their contiguous wetlands, and "phase 2" waters, which are the "primary tributaries"[15] of navigable waters and their adjacent wetlands, were still subject to the Corps regulation after *SWANCC* according to Justice Stevens. However, "phase 3" waters, which are "all other waters covered by the statute, and can include such isolated waters as intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters," *Id.* at 188 (internal quotations omitted), were excised from the scope of the CWA by the *SWANCC* decision. *Id.* at fn. 14.

5. *SWANCC* also called the 1986 regulations into question. The Supreme Court expressly refused to give deference to the Corps' regulations. *SWANCC*, 531 U.S. at

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[15] The Corps' 1975 regulations define "Primary tributaries" as "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. 209.120(d)(2)(ii)(e).

170, 174.[16] According to the Supreme Court, "The Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with its new regulations." *Id.* at 168 (emphasis in original). In those original regulations, the 1974 regulations, the Supreme Court pointed out that the Corps "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor [in deciding jurisdiction].' 33 C.F.R. § 209.260(e)(1)." *Id.* The Supreme Court noted that there was nothing in the legislative history to signify that "Congress intended to exert anything more than its commerce power over navigation." *SWANCC,* 531 U.S. at 168 n.3.

6. Even before *SWANCC* was decided, the Fourth Circuit held that the Corps exceeded its authority under the CWA. In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit held that the Corps exceeded its congressional authorization under the CWA when it promulgated 33 C.F.R. § 328.3(a)(3),[17] defining "waters of the United States" to

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[16] "We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference." *SWANCC*, 531 U.S. at 174.

[17] 33 C. F.R. § 328.3(a)(3) defines "waters of the United States" to include:

"All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which *could affect* interstate or foreign commerce including any such waters;

(i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

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include intrastate waters which need not have anything to do with navigable or interstate waters. Therefore, the Fourth Circuit held that 33 C.F.R. § 328.3(a)(3) is invalid. The Fourth Circuit stated, "Absent a clear indication to the contrary, we should not lightly presume that . . . Congress authorized the [Corps] to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Wilson,* 133 F.3d at 257.

7. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC,* 531 U.S. at 172. This requirement stems in part from the assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. *Id.* Additionally, the Corps has re-interpreted its authority under the CWA several times since its passage, further pushing the limit of congressional authority with each new set of regulations. Therefore, at least as to its 1986 and later adopted regulations, the Corps is not entitled to administrative deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).[18]

(iii.) Which are used or could be used for industrial purpose by industries in interstate commerce." (Emphasis in *Wilson*, 133 F.3d at 257).

[18] The "phases" discussed by Justice Stevens in his *SWANCC* dissent, 531 U.S. at 188, fn. 14, are identical to the "phases" outlined in the preamble to the 1975 regulations. 40 Fed. Reg. 31,320-21 (1975). The fact that Justice Stevens also uses pre-1986 regulations in interpreting the scope of the CWA further supports the contention that only pre-1986 regulations are entitled to administrative deference under *Chevron*.

8. The Corps has not carried its burden of factually proving a sufficient connection between the wetlands on the Property and navigable waters or waters of the United States. Surface water leaving the Property must pass through miles -- via (1) a spur ditch; (2) the eastern, manmade I-64 drainage ditch; (3) a culvert under I-64; (4) the western, manmade I-64 drainage ditch (portions of which were indisputably constructed through "dry lands"); and (5) non-navigable parts of Stoney Run -- before finding navigable waters. The Corps argued that each segment of this path qualified as "waters of the United States" under the 1986 regulations. The Corps relied at trial exclusively on this "surface water connection" or "hydrological connection" for jurisdiction, although neither of those terms are included in even the 1986 regulations. Further, were the Court to allow this "surface water connection" to suffice for jurisdiction, any property connected by a drainage pipe or culvert to navigable waters would fall under the Corps' jurisdiction, for the Corps argues that a culvert or storm drainage pipe connection from wetlands to a tributary to navigable waters is a sufficient surface water or hydrological connection. In fact, it argues that a culvert or storm drainage pipe meets its newest definition of a tributary. The arbitrariness of this position is illustrated by the Corps' evidence regarding the wetlands east of Jefferson Avenue, which were historically a portion of the wetlands on the Property but whose hydrological or surface water connection was severed by the construction of Jefferson Avenue. The Corps evidence opines that Jefferson Avenue severs this connection and thereby eliminates the easterly wetlands from Corps jurisdiction since there is no culvert connecting them to the Property. Such a rule leads to situations where wetlands which otherwise would be under Corps jurisdiction are rendered non-jurisdictional by the construction of a road or other manmade obstruction. Conversely, should a storm drain be installed under Jefferson Avenue the easterly wetlands would be hydrologically

reconnected to the Property and allegedly become jurisdictional. Thus, wetlands could alternately become jurisdictional or non-jurisdictional in tandem with adjacent road and storm drainage construction.

9. Even if the Corps had proven factually that under the 1986 regulations the wetlands on the Property would be considered jurisdictional, these rules which it seeks to apply have far exceeded the grant of authority by Congress in the CWA. The multiple changes the Corps has made to its CWA regulations have substantially increased the reach of its regulatory powers. For example, the 1974 regulations used the term "navigable waters of the United States" to define "the scope and extent of the regulatory powers" of the Corps. 33 C.F.R. § 209.260(b) (1974). The Corps used a limited definition for "navigable waters of the United States," which restricted their jurisdiction to waters which "are subject to the ebb and flow of the tide and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974). However, by 1986, the Corps had distinguished the terms "navigable waters" and "waters of the United States," 33 C.F.R. § 320(d) (1986), given the term "waters of the United States" a far more expansive definition than "navigable waters," 33 C.F.R. § 328.1 (1986), and determined that the more expansive "waters of the United States" would now define the scope of their jurisdiction under the CWA. *Id.* In adopting these changes, it usurped Congress' authority to determine the Corps' jurisdiction. Additionally, the Corps replaced the limited term "navigable waters" with the expansively defined term "waters of the United States" in several other places throughout the regulations, further expanding its own jurisdiction. *See e.g.* 33 C.F.R. 209.120(b)(7) (1974) and 33 C.F.R. § 209.120(b)(7) (1986); 33 C.F.R. § 209.120(c) (1974) and 33 C.F.R. § 209.120(c) (1986); 33 C.F.R. § 209.120(d)(3)

(1974) and 33 C.F.R. § 323.2(c) (1986); 33 C.F.R. § 209.120(e)(2) (1974) and 33 C.F.R. § 323.3(a) (1986).

10. Although the 1986 regulations state that the Corps generally excludes non-tidal drainage and irrigation ditches excavated on dry land from its definition of tributaries over which it asserts jurisdiction, it reserves the power to claim jurisdiction over such ditches on a "case-by-case basis." 51 Fed. Reg. 41,217 (1986). In other words, the 1986 regulations have expanded the Corps' power to the point where it may give itself jurisdiction even over the waters that the regulations define as generally not qualifying under the expansively-defined term "water of the United States." The Corps does not indicate in the regulations how it will go about making such a "case-by-case" determination. Thus, there are no definable limits to the Corps' definition of tributaries over which it possesses jurisdiction. *See Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294 (1972) (stating that due process requires insufficiently clear regulations be held void for vagueness); *See also Bullfrog Films, Inc. v. Wick,* 847 F.2d 502, 514 (9th Cir. 1988) (holding that United States Information Agency ("USIA") regulations were unconstitutionally vague because "The regulations enable USIA officials to act in an arbitrary and discriminatory manner in granting or denying permits and still be completely within the scope of their regulations . . . This kind of unfettered discretion is patently offensive to the notion of due process.") (internal quotations omitted).

11. The legislative power is vested in Congress. It cannot be abdicated or transferred to others. Separation of Powers between the three branches of government requires that the enactment of a statute be a legislative function which cannot be transferred to an administrative body. Since promulgating the 1974 regulations, Congress has not passed a statute granting the Corps any additional authority under the CWA. However, by dramatically expanding its own authority

through amendments to its own regulations, the Corps has in effect amended the CWA, thereby usurping the power of Congress. While expanding its authority through new regulations may be more expedient than convincing Congress to do so through properly enacted legislation, it is not permissible for the Corps to take a shortcut by continually redefining regulatory terminology and therefore its own jurisdiction.

Albeit speaking in dissent, the language chosen by Circuit Judge Widener in *United States v. Baker,* 45 F.3d 837, 850 (4th Cir. 1995) is instructive. Judge Widener stated:

> "The Virginia Court, in addressing the delegation of legislative power, has addressed the importance of not approving shortcuts on account of administrative convenience, and we should heed that admonition. In *Thompson v. Smith,* 155 Va. 367, 154 S.E. 579, 584 (1940), the Court stated:
> It is a fundamental principle of our system of government that the rights of man are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principal ought not to be surrendered for convenience or in effect nullified for the sake of expediency."

12. The Court **FINDS** that when Congress passed the CWA, it did not intend for the Corps to greatly expand what qualifies as jurisdictional waters of the United States. In addition, the Court **FINDS** that when Congress passed the CWA, it was not Congress's intent to vest the discretion in the Corps to decide on a case-by-case basis which ditches constructed partially through dry lands and which culverts should be defined as tributaries to waters of the United

States.[19] However, under 51 Fed. Reg. 41,217 (1986), this is precisely the scope of authority the Corps has granted itself.

13. The Corps, in exerting jurisdiction over the wetlands on the Property, has exceeded the authority granted to it by Congress. The Supreme Court in *SWANCC* made it clear that the 1974 regulations, promulgated two years after the CWA's enactment, are more consistent with the intent of Congress. *SWANCC.* 531 U.S. at 168. These regulations focused on "navigable waters" and the "water body's capability of use by the public for purposes of transportation or commerce." 33 C.F.R. §§ 209.120(d)(1), 209.260(e)(1) (1974). The Supreme Court noted that Congress intended to only exert its "commerce power over navigation." *SWANCC*, 531 U.S. at fn 3. In the case at bar, only by multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters, are the wetlands on the Property even remotely connected to navigable waters or a water body capable of use by the public for purposes of transportation or commerce. Further, the wetlands on the Property bear no relation to the commerce power over navigation. Therefore, the Court **FINDS** that the wetlands on the Property fall outside the scope of the CWA.

14. The Court agrees with the sweep of *SWANCC* as explained in the dissent written by Justice Stevens and joined by three other Justices. Although not essential to the holding,

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[19] It is noteworthy that in closing argument counsel for the Corps relied on the "case by case" language from the 1986 definition of tributaries. The argument was generally that although the evidence clearly proved that the ditch abutting the westerly side of I-64 was constructed partially through dry land, the Corps had jurisdiction over this link to the Property because it had determined that jurisdiction was appropriate "in this case." The preamble to the 1990 definition of tributaries specifies that such ditches are jurisdictional unless they are ". . . constructed entirely in upland areas . . ." 65 Fed. Reg. 12,824-825 (2000). It appears that even the Corps own attorneys have difficulty in keeping pace with these ever-changing regulations.

Justice Stevens opined that *SWANCC* excluded wetlands and tributaries that are not contiguous or adjacent to navigable waters from the scope of the Corps' jurisdiction. *SWANCC*, 531 U.S. at 188, fn. 14. The wetlands on the Property are not adjacent to navigable waters by any reasonable definition of adjacency. Further, the Corps argues that the spur ditch, the two I-64 drainage ditches and the culvert under I-64 qualify as tributaries. However, even if the Court were to accept the 1986 regulations and find that the ditches and culvert can be so defined, none of these alleged tributaries are contiguous or adjacent to navigable waters or waters of the United States. Thus, the Court **FINDS** that *SWANCC* alone eliminates any claim of jurisdiction by the Corps in this case under any permissible interpretation of the facts as presented by the Corps.

15. As in the Fourth Circuit's holding in *Wilson*, the Army Corps of Engineers exceeded its congressional authorization under the CWA. In this case, the Corps did not have congressional authorization to regulate the wetlands on the Property. Accordingly, the Court **FINDS** that the Corps did not have jurisdiction to regulate the wetlands on the Newdunn Property and Newdunn was not required to obtain a permit under the CWA prior to conducting the activities delineated in the Corps' Complaint.

16. In determining whether the Court has jurisdiction to decide if Treacy and the Board possessed jurisdiction over the Property, the Court **FINDS** that the nature and timing of Treacy's filing of *Treacy v. Newdunn*, Civil Action No. 4:01cv86, establishes that this filing was in reaction to this Court's issuance of a Preliminary Injunction in *United States v. Newdunn*, Civil Action No. 2:01cv508. Further, since, in determining this issue, the Court must decide whether the Board's jurisdiction is dependant on that of the Corps, the paramount issue in the two cases are identical and judicial economy encourages consolidation.

17. The holding in *SWANCC* affirms that the State has broader authority to regulate wetlands within its borders than does the Corps under the CWA. However, in this case, Treacy has been unable to show that the Virginia Legislature has, at this time, granted regulatory authority independently of the Corps' jurisdiction.

18. The enabling legislation relied on by Treacy, Va. Code 62.1-44.5 and 62.1-44.15:5 (the "state statute"), was adopted prior to the Supreme Court's decision in *SWANCC*, when many federal courts had interpreted the reach of the Corps' jurisdiction more broadly than that permitted under *SWANCC*'s holding. Therefore, it was logical at the time the Virginia legislature passed this statute to base its jurisdiction upon the Corps' seemingly unlimited jurisdiction.

19. The state statute defines wetlands as land so delineated by the Corps and over which the Corps has jurisdiction. The statute reads in part, "Any delineation accepted by the U.S. Army Corps of Engineers as sufficient in its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland." Va. Code § 62.1-44.15:5(D).

20. Va. Code § 62.1-44.15:5(A) states, "Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act."

21. Va. Code § 62.1-44.15:5(B) states, "The Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act . . ."

22. The term "wetlands" is defined identically by state statute as by the Corps' regulations. 33 C.F.R. § 328.3(b) and Va. Code § 62.1-44.3 defines "Wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to

support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

23. The language in the state statute defining wetlands as land so delineated by the Corps and over which the Corps has jurisdiction under the CWA, Va. Code § 62.1-44.15:5(D), and establishing the permitting process as coexistent with the permit required under the CWA, Va. Code §§ 62.1-44.15:5(A) and (B), makes it clear that the state statute is coextensive with the CWA.

24. The fact that the term "wetlands" is defined identically by the state statute as by the Corps regulations, 33 C.F.R. § 328.2(b) and Va. Code § 62.1-44.3, supports this interpretation of the state statute.

25. The language used by the VDEQ and the Board proves that they have been consistently relying on the jurisdiction of the Corps in asserting state jurisdiction. In a letter dated July 31, 2001 to Newdunn's counsel by VDEQ counsel, the VDEQ explicitly based its jurisdiction on the Corps' jurisdiction. In both the Emergency Special Order issued on June 25, 2001 and Final Special Order issued on October 4, 2001, the VDEQ used the Corps' claim of jurisdiction over the Property as its first Finding of Fact, on which it based its own jurisdiction. Surprisingly, the October 4, 2001 Final Special Order used this language even after the Court discussed the VDEQ's apparent dependence on Corps' jurisdiction in its August 31, 2001 Order. There was no reason for the VDEQ to repeatedly use this language unless Treacy was relying on it in asserting jurisdiction.

26. The fact that weeks before trial, on February 8, 2002 the Board issued a Supplemental Final Special Order that for the first time omitted this language is unpersuasive. By that time, the Court had cited this language in several Orders and at several hearings for the proposition that Treacy's actions

were dependent upon the Corps' jurisdiction, in spite of the arguments of Treacy's counsel to the contrary. This omission at such a late date demonstrates that the language was important to the Board's prior decisions, and appears to be an effort to circumvent the prior findings of the Court on this issue.

27. Therefore, the actions of and language used by the VDEQ and the Board support the Court's interpretation of the statute as granting the state jurisdiction coextensive with Corps jurisdiction under the Clean Water Act.

28. Accordingly, the Court **FINDS** that Treacy and the Board exercised the State's jurisdiction over the Property based on the Corps' claim that the Property contains jurisdictional wetlands under the CWA.

29. Having found that the Corps has no jurisdiction, it follows that the Court **FINDS** that Treacy, acting on behalf of the Board, has no jurisdiction.

30. Having found Treacy and the Board lack jurisdiction, the Court **DECLINES** Newdunn's request to decide whether its activities constituted a violation of the state's regulatory statute. The Court also **DECLINES** to consider the constitutionality under state law of the state regulatory scheme, an issue which Newdunn raised for the first time at trial. Both of these issues are better left to the appropriate state court or agency.

31. Since neither the Corps, nor Treacy and the Board, have jurisdiction over the wetlands on the Newdunn Property, the Court **ENTERS JUDGMENT** for the **DEFENDANTS.**

IV. Summary

Congress passed the CWA in 1972. The Corps adopted regulations interpreting that act in 1974. Although since 1972 Congress has not granted the Corps additional jurisdiction,

the Corps has made multiple changes to its original regulations expanding its jurisdiction. The 1986 regulations adopted by the Corps substantially expanded the definition of jurisdictional waters and, in doing so, granted itself dramatically more authority. In making these changes, it usurped Congress' authority to determine the Corps' jurisdiction. Accordingly, the Court **FINDS** that the Corps did not have authority under the CWA to adopt the 1986 regulations or any regulations adopted thereafter since the 1986 regulations are not entitled to administrative deference under *Chevron,* 467 U.S. 837.

The Court **FINDS** that the Corps did not have jurisdiction over the Property under the regulations existing prior to 1986. Further, the majority opinion in *SWANCC* makes it clear that the Supreme Court excised the Property from the scope of the CWA, even under the 1986 regulations, as the wetlands on the Property are not adjacent to navigable waters or waters of the United States by any reasonable definition of adjacency.

Accordingly, the Court **FINDS** that even under the 1986 regulations as interpreted by *SWANCC*, the Corps still has not proven a sufficient connection between the property and navigable waters or waters of the United States to establish jurisdiction over the Property.

Therefore, the Court **FINDS** that the Corps lacks jurisdiction under the CWA to regulate the Property.

It may well be that the Corps' amendments to its regulations are meritorious in attempting to protect the environment, although in this instance, the Corps' interpretation of its jurisdiction is more likely to harm than help the Chesapeake Bay. However, the fact that the Corps has a meritorious scientific basis for expanding its jurisdiction in an effort to protect the environment does not authorize it to usurp the function of the legislative branch for

the sake of expediency. It is incumbent upon the Courts to prevent the Corps from shortcutting the legislative process.

The enabling legislation relied on by Treacy was adopted prior to the Supreme Court's decision in *SWANCC*, when many Federal Courts had interpreted the reach of the Corps' jurisdiction more broadly than that permitted under *SWANCC*'s holding. The language of the state statute makes it clear that the statute granting the state jurisdiction is coextensive with the CWA. The actions of and language used by the VDEQ and the Board further supports this interpretation of the state statute. The Court **FINDS** that Treacy and the Board sought to exercise the State's jurisdiction over the Property based on the Corps' claim that the Property contains jurisdictional wetlands under the CWA. In determining the question of the Court's jurisdiction to decide this issue, the Court **FINDS** that the nature and timing of Treacy's filing of *Treacy v. Newdunn*, Civil Action No. 4:01cv86, establishes that this filing was in reaction to this Court's issuance of a Preliminary Injunction in *United States v. Newdunn*, Civil Action No. 2:01cv508. Further, since the Board's jurisdiction is dependant on that of the Corps, the paramount issue in the two cases is identical and judicial economy encourages consolidation. Having found that the Corps has no jurisdiction, it follows that the Court **FINDS** that Treacy, acting on behalf of the Board, has no jurisdiction. Having found Treacy and the Board lack jurisdiction, the Court **DECLINES** Newdunn's request to rule upon the issue of whether its activities constituted a violation of the state's regulatory statute. This issue is better left to the appropriate state agency or court. The state court is also the more appropriate forum to decide the constitutionality under state law of the state regulatory scheme, an issue which Newdunn raised for the first time at trial.

Since neither the Corps, nor Treacy and the Board, have jurisdiction over the wetlands on the Newdunn Property, the Court **ENTERS JUDGMENT** for the **DEFENDANTS**.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED**.

HENRY COKE MORGAN, JR.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 3rd, 2002

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter --

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to

quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1311 Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1344 Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites. Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

* * *

(g) State administration.

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any

pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

33 C.F.R. § 328.3 Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

* * *

(b) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

* * *

(e) The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

* * *

33 C.F.R. § 328.4 Limits of jurisdiction

* * *

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.